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THE FACE OF PROGRESS

One hundred years ago, the London *Economist* carried a statement that treaties would not secure peace, and that their probable effects would be "to lull vigilance to sleep (and) to make the people falsely believe that they were exempt from the danger of war. . . . (A plan whereby nations should bind themselves by treaties to submit international disputes to arbitration) would be very injurious, by making living men place a reliance on verbal or written national engagements, which all experience shows they do not deserve. . . . All such contrivances seem to us something like delusions founded on the erroneous notion that abstract declarations can be substituted for the living motives of living men."

This expression of lack of confidence in the ability of men and of the governments of men to maintain peace through international agreements is, happily, fading. Today, even in the face of international differences, we show our faith that peace may be achieved by compacts between nations and that war is not inevitable, by establishing in our major international conventions the channels for peaceful adjustment of international controversies. Most agreements go so far as to make specific provision for arbitration as the means of settlement, and outline the methods of procedure.

The last 100 years have seen all manner of international conflicts arise, and have seen industry and commerce, science and technology develop amid wars and revolutions. From that morass, we have come to learn that our own well-being is inextricably interwoven with the well-being of all and that the benefits which a world at peace confers upon all must be placed before selfish interests. Indeed, the fundamental belief that nations will, in the main, abide by their promise to maintain peace by relying upon pacific settlement of their disputes, is the cornerstone of United Nations policy.

Progress toward world peace shows its face wherever people talk in terms of averting war permanently, and wherever governments back up this talk by utilizing the machinery established by international agreements for maintaining harmony among nations.

SHOULD LABOR ARBITRATORS PLAY FOLLOW-THE-LEADER?

BY

WILLIAM H. MCPHERSON

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"I've hunted in every source there is, and I just can't find it," said the occasional arbitrator. "You would think that someone must have decided a case like the one I heard last week, but apparently this issue has never been raised before." The implication seemed to be that the lack of a published precedent made it a mighty tough case to decide. As he sketched the basic facts of the case, it did appear unlikely that a similar one would be found in the published compilations, for the contention of one of the parties was so patently absurd as to make duplication improbable.

Another arbitrator recently concluded a hearing by stating that it would take him several days to prepare his award, since it would require some time to look up and study other decisions on dismissal cases.

These instances are illustrative of a growing tendency on the part of arbitrators and parties to give some weight to precedents in the consideration of grievance cases. Some occasional arbitrators are seeking guidance from the decisions of others, rather than relying on their own best judgment for the appropriate award.

Management and union representatives are also seeking more frequently to bolster their arguments by reference to awards made in other cases. Surely many arbitrators have experienced in recent months the citation by party spokesmen of the awards of others in the guise of supporting evidence.

Another indication of this tendency is to be seen in the written decisions of some labor arbitrators. "The use of familiar common law techniques of citation, analysis, and distinction of precedents, is becoming more frequent."[1]

The tendency that is evidenced in these various ways might be called a trend toward the application of the legal doctrine of *stare decisis* in the presentation and decision of labor arbitration cases. As yet, the doctrine is not applied formally and avowedly, but is

[1] Note on "Case Law or 'Free Decision' in Grievance Arbitration," *Harvard Law Review*, vol. 62, p. 118 (1948).

used rather in an informal manner, exerting a largely unacknowledged influence on the thinking of some of the persons involved. Statements of contestants and arbitrators frequently infer that the doctrine is applicable to arbitration, even though their authors know this is not the case. Some of the participants are trying to play follow-the-leader. A careful analysis of the desirability of this trend is therefore necessary.

The following of precedent is to be expected in certain circumstances. Surely any arbitrator or umpire will normally wish to maintain consistency with his previous decisions in cases involving the same parties. Similarly, an *ad hoc* arbitrator or a newly appointed "permanent" umpire will be influenced to a considerable extent by the decisions of his predecessors. Therefore, the only questions here raised are whether an arbitrator should seek guidance from the decisions of others in cases involving different parties and whether the parties can appropriately cite such decisions in support of their arguments.

Reasons for Precedent-following

There are several reasons why increasing emphasis is being placed on precedent both by the parties and by some arbitrators. The most obvious reason is that a great many awards are now available for ready reference in published form. Without such availability, the practices here under consideration could never have become significant.

A second reason lies in the relative inexperience of many arbitrators. Most of them take a case only at infrequent intervals, and some of these lack complete confidence in their own ability. It is but natural that they should seek guidance from published awards.

Custom also plays a considerable role in the tendency to apply the doctrine of *stare decisis* to grievance arbitration. The importance attached to this doctrine in legal cases is common knowledge. When arbitrators' awards are published in much the same form as judicial opinions, it is inevitable that some people will attempt to use them in the same way. Some party spokesmen and some arbitrators are certain to seek in them support for their positions.

Doubtful Benefits

The application of the doctrine of *stare decisis* to labor arbitration might be of some benefit. As has been indicated elsewhere,[2] it might

[2] *Ibid.*, p. 123.

result in greater predictability of awards. Consequently, it might conceivably reduce the number of contested cases. However, it is doubtful that even this advantage would be achieved. Predictability might be destroyed by the development of conflicting lines of decision, especially in the absence of an appeals procedure. Even if attained, predictability might not substantially reduce "litigation", since the probable outcome of many current cases is pretty well known to the parties in advance.

It seems unlikely that any real gain would result from the following of precedent in the types of cases here under consideration. Even persons who have argued in support of publication of awards have been wary of claiming any advantage in the development of a "common law" of labor agreement interpretation. Thus Theodore Kheel says that ". . . arbitration will bring a labor peace built, not on an ever increasing body of law, but on common sense."[3] He recognizes that some persons are concerned lest published awards may be used as precedents, but considers such a development unlikely, since—he contends—the experience of the arbitrators, rather than their results, will be used. The distinction between experience and results seems vague, if not illusory. In any case the developments of the intervening three years show that his optimism in this respect was not well founded.[4]

Similarly, John W. Taylor avoids outright advocacy of application of the doctrine of *stare decisis*. "Although it is frequently said that precedents have no place in arbitration, few arbitrators would object to obtaining hints in deciding a doubtful issue from other awards which appeared to be thoughtfully and fairly reasoned."[5] He seems, however, to assume that precedents will be widely followed, for he says that when an award in a parallel case has been published, one of the parties will have a readymade argument in support of its contentions.[6] He foresees two benefits from the publication of awards.

[3] *Arbitration Journal*, N. S., vol. 1, p. 424 (1946).

[4] Mr. Kheel advocated publication of awards chiefly on the grounds that it would bring arbitration to the attention of labor and management as the best means of resolving unsettled grievances and would show that arbitration works. It is not clear how the publication of an award can provide any assurance regarding its workability.

[5] *Arbitration Journal*, N. S., vol. 1, p. 422 (1946). It might well be argued that the use of published awards here suggested is more dangerous to the integrity of labor arbitration than the formal adoption of the doctrine of *stare decisis*.

[6] *Ibid.*

He suggests that ". . . publicity of labor awards can, if properly handled, be of the greatest service both in the early settlement of disputes that might otherwise go to arbitration and in facilitating sound judgment in the awards when resort is made to arbitration."[7] The first of these contentions is irrelevant to the present topic, though one might be tempted to offer at least a modest bounty for the capture of such a validated instance. Regarding the second contention, it seems probable, for reasons to be discussed later, that a practice of precedent-following is more likely to reduce than to increase the soundness of awards.

Dangers

While the possible advantages of such a practice are, to say the least, few and dubious, its dangers are considerable.

The adoption, formally or informally, of the doctrine of *stare decisis* would do much to formalize the arbitration process. Arbitration would become legalistic. The parties would no longer be able to argue their cases solely on the merits of the specific situation. They would have to incur added costs by employing experts to search previous awards. In this eventuality, arbitrators would presumably be selected no longer for their ability to understand and settle constructively difficult labor relations problems, but rather for their extensive knowledge of established rules of labor agreement interpretation. Grievance arbitration would become a means for obtaining a ruling on right and wrong between two antagonists rather than a method for maintaining good relations between two parties who must continue to work and live together. Arbitration would then have lost most of its peculiar advantages, and labor disputes might almost as well be referred to the regular courts for mere adjudication.

The widespread misunderstanding regarding the inapplicability of precedent in labor arbitration is already creating some problems for arbitrators. The decisions of various arbitrators are being compared, usually on a very superficial basis. A party knowing that a more favorable award was made in another instance may, without any real knowledge as to whether the other award was sound or whether the two cases are identical, lose confidence in an able arbitrator.

A widespread practice of precedent-following would also have serious consequences for contract negotiation. Particular phrases

[7] *Ibid.*, p. 421.

would come to have their special meanings, so that parties would have to be extremely cautious about the wording of their agreements. A thorough knowledge of previous awards and the "common law" of labor agreements would be essential in contract drafting. Negotiations would probably be conducted largely by specialists, with less direct participation by management and union officials. Troublesome disputes over contract wording might well become more frequent. Emphasis would be shifted from intent and understanding to phraseology. Some parties might try to take advantage of the other's lesser familiarity with past awards, thus fostering mutual suspicion. Collective bargaining is now happily a highly individualistic process. Its standardization would be a serious loss.

Any attempt to follow precedent in labor arbitration is especially dangerous because this purpose cannot accurately be accomplished. In the first place, arbitration awards are not—and should not be—written in such a way as to permit a precise analysis of the applicability of the decision to other cases. Court opinions are written for lawyers, but arbitration opinions are written for the parties.[8] An arbitrator's opinion has two primary purposes. It seeks to convince the parties of the reasonableness of the decision and also to assist them in the development of good relations in the future. Frequently, it is impossible or impolitic to set forth every consideration that influenced the award.[9] Moreover, "the technical devices by which precedents are distinguished in the courts are as a practical matter not available to the arbitrator, who is faced with the necessity of 'selling' his award to the parties."[10] The judge, on the other hand, drafts his opinion primarily for the purpose of justifying his decision in the eyes of his colleagues. He makes a conscious effort to cover all of the factors bearing on the general applicability of his decision. He can usually do this without misgiving, for he has no need to consider the possible effect of his opinion on the future relations between the parties. Indeed, it is unlikely that the litigants will have any future dealings with each other. As a result of this contrast, it is impossible to tell whether an arbitration award that

[8] *Supra*, note 1, p. 124.

[9] This point has been emphasized by other writers. See, e.g., Aaron Levenstein, "Some Obstacles to Reporting Labor Arbitration," *Arbitration Journal*, N. S., vol. 1, p. 426 (1946).

[10] *Supra*, note 1, pp. 120-1.

may have been appropriate in one case would be equally appropriate in another.

The second reason why precedent cannot accurately be followed in labor arbitration is suggested by this succinct statement of Leo Cherne: "The judge's decision is subject to appeal; the arbitrator's award is, by consent, final."[11] Consequently, there is no official basis for distinction between sound and unsound awards. Such a distinction can be based only on the superficial reasonableness of the opinion, for no superior authority has reviewed the decision in the light of the record. An inept award may be cited as readily as an apt one. Moreover, in the absence of appeal there are certain to be many apparently conflicting decisions. Citation, if seriously undertaken by two parties might well develop into an endurance contest.

A further reason why the citation of awards cannot be meaningful in this field is that only a fraction of the total awards is published. Moreover, the available sample is based not on merit or significance, but primarily on the willingness of the parties and arbitrators to submit their awards for publication. Since a number of experienced arbitrators are reluctant to submit their awards, it is quite possible that the compilations may not include some of the best awards on certain issues.

Remedies

In view of the dangers in the present trend toward an informal following of precedent, serious consideration must be given to determining the best means of checking this development.

Fortunately, it is clear that arbitrators are at least under no obligation to consider other awards. The courts have held consistently that an arbitrator is not bound by precedents, and need not follow strict rules of law.[12] The *Standards of Practice for Arbitration* issued by the American Arbitration Association (1949) provide in No. 25: "The arbitrator need not be influenced by precedents established through the decisions of other arbitrators. He is entitled to exercise his independent judgment in arriving at a decision."[13] However, further measures appear to be necessary.

[11] Should Arbitration Awards be Published?", *Arbitration Journal,* vol. 1, N. S., p. 75 (1946).

[12] See references in *Corpus Juris Secundum,* vol. 6, par. 64a, p. 203.

[13] See also "Code of Ethics for Arbitrators," *Arbitration Journal,* N. S., vol. 1, p. 214 (1946).

Previously published discussion of this problem has centered largely on the undesirability of the publication of awards. It now seems futile to anticipate relief from this source. Even if improper use of published awards were discontinued, there would still be a widespread interest in them on the part both of students and practitioners. Also, it can be expected that there will continue to be many arbitrators who will take pride in the publication of their awards. Where a considerable demand and supply are both present, it is probably inevitable that publishers will serve as intermediaries.

A partial remedy lies in a continued emphasis—as here attempted—on the inappropriateness of precedent-following. If recognition of the dangers inherent in this practice becomes general, it may result in a reluctance of parties to cite awards in an attempt to bolster their argument. Unwillingness to present a case solely on its own merits may come to be interpreted as a sign of weakness. Also, it may be considered that citation indicates either a lack of confidence in the judgment of the arbitrator or a belief that he may be swayed by irrelevant considerations. An attempt to induce an arbitrator to follow some alleged precedent may come to be recognized as at least bad etiquette.

General recognition of the importance of deciding each case purely upon its own intrinsic merits may also lead arbitrators to disregard the citation of cases by the parties, and give them the courage to omit from their opinions any detailed analysis of the applicability of the other awards to the current case. The opinion in such cases might well be confined to the merits of the case and a general statement regarding the inappropriateness of precedent-following in grievance arbitration. In fact, the American Arbitration Association might well draft a standard paragraph on this subject for the general use of arbitrators.

Any move toward general education in the proper use of published awards might be aided if the publishers would impress upon their clientele the dangers of misuse. The title page of each issue might well include "Directions for Use," such as appear on the containers of many products. It might also include a warning against improper application, similar to those found on certain medicants that are intended for external use, but poisonous if taken internally. The imprint of the customary skull and crossbones might be omitted, even though it would not be entirely inappropriate.

If other remedies are inadequate, it may become necessary to consider the advisability of an understanding among arbitrators that citation of cases involving different parties is inadmissible as evidence. The American Arbitration Association and the National Academy of Arbitrators might well initiate discussion of this possibility. There should be some reluctance to resort to such a general ruling, for there is now no general limitation on the admissibility of evidence, and any move toward restriction might conceivably prove to be a first step toward further limitation. On the other hand, such a ruling—or even an extensive discussion of its advisability—would bring the problem forcefully to the attention of all concerned. The seriousness of the present tendency to join in the game of follow-the-leader may warrant a drastic remedy.

American Wax Importers and Refiners Association, comprising eighteen of the largest wax importing firms in the United States, has adopted the arbitration clauses recommended by the Inter-American Commercial Arbitration Commission and the American Arbitration Association. The clauses are to be embodied in the standard contract forms drawn up for the import and domestic wax trade, respectively. Another trade association thus recognizes the benefits to be derived from establishing machinery for the settlement of controversies through arbitration as administered by organizations devoted to inexpensive, speedy and efficient methods of administering the proceedings.

CONTESTED BREACH OF CONTRACT SUITS

BY

HAROLD KORZENIK

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WHILE most merchants have learned to be insistent upon written agreements on the sale of goods, few have given thought to the enforcement of such agreements. Of course, there are considerations of customer relations and goodwill which enter in every case of breach of contract to soften the blow and perhaps avoid all remedy in the hope of "making it up" next time. In most cases, that fond expectancy is illusory.

However, it sometimes comes about also as a result of the dread of the loss of time and money involved in suing for breach of contract, particularly where there is a claim of defective merchandise in breach of warranty.

In such instances an arbitration clause in the sales contract would afford the best solution. In this connection, the attention of the Industry should once more be called to the arbitration clause which is part of the form of sales contract approved by the National Retail Dry Goods Association, in collaboration with National Knitted Outerwear Association, and other trade groups.

If such an arrangement is made in the sales contract, any subsequent dispute arising out of it may be submitted to arbitration, which has many advantages, some of which I now touch upon.

1. *Jurisdiction.* In many cases the retailer is out of town and if resort is made to ordinary litigation, great difficulty will be encountered in serving process. Unless a special situation makes it possible to serve the retailer in your home state, you will have to go to his state. This entails the employment of local counsel and proof of sometimes involved facts in a distant jurisdiction. Under the rules of the American Arbitration Association, and the National Knitted Outerwear Association, service of process may be had by mail and in most cases, the arbitration will be in New York City, unless otherwise specified. This is an advantage of tremendous value. The mechanics of litigation are not clear to the layman, but if you have had experience with one stubborn case you will understand the value of this procedure.

2. *Informality.* In arbitration, the usual rules of evidence do not necessarily apply. The arbitrator is sole judge of what is competent and proper proof. In other words, documents and other writings will very often be received in evidence by the arbitrator, even though a witness is not present to authenticate the papers. The arbitrator will, in most cases, be a person familiar with the industry and aware, by experience, of the background against which the parties stand. The process of elementary education, in cases involving a breach of warranty before a judge and jury is painfully drawn out, difficult, and sometimes ineffectual. The formalities of the law court are important and desirable safeguards in general litigation, but in cases involving quality and workmanship, the best judge is one who knows merchandise, or at least the nature of the industry in which the parties operate. The proof before an arbitrator is generally informal and direct.

3. *Time.* In commercial litigation involving the quality of goods, time is a very important consideration. If the goods are found to be proper, the buyer should know about it as soon as possible so that he can promptly deal with the merchandise as his own. If the goods are found unsatisfactory, then the seller should know likewise about it early so that he too, in turn, may make the best use of them. Great loss to both sides is very often entailed by the mere delay in reaching judgment. Arbitration is generally arranged for a time to suit the convenience of all parties concerned and even the convenience of witnesses. The long wait for being called in the course of the call of the court's calendar is not only time consuming, but often makes the appearance of all necessary witnesses extremely difficult to arrange. Salesmen have to leave for the road, the parties may be vacation-bound, others may become suddenly ill, etc. The Court Calendar does not permit the flexibility available in arbitration.

4. *Goodwill.* Arbitration does not have the unpleasant atmosphere of battle that court litigation sometimes engenders. The very informality of it suggests a friendly approach to a solution of what may very well be a gentlemen's difference. This is particularly true if the parties are able to agree upon who the arbitrator of their dispute should be.

5. *Effectiveness.* The result of an arbitration properly conducted is an enforceable award. That award can be reduced to judgment

in the courts of law, with the same effect as if there had been a trial in Court. The same methods of collection may then be pursued and the same remedies are available to compel payment. There is no appeal from the arbitration award and it will normally stand, unless, of course, there is evidence of corruption, prejudice or other impropriety.

Although parties may agree to arbitrate after the dispute has arisen, arbitration is not generally available and involves obtaining the consent of both parties at a time when it may not be to the advantage of both to agree. It is far better to be assured by a properly written contract made at the outset before difficulty arises.

We have on numerous occasions before this called attention to the need for properly drawn sales agreements, signed by both parties. We renew that caution to you at this time and add the additional note that it would be eminently desirable to include in the agreement an arbitration clause which would give the assurance of swift, convenient solution of such disagreements as may later arise.

The Arkansas River Compact of December 14, 1948 between the states of Colorado and Kansas, approved by Congress May 31, 1949, provides for the settlement of controversies arising from the control and utilization of the waters of the Arkansas River as well as for the apportionment of the waters. The compact establishes an interstate agency, the Arkansas River Compact Administration, consisting of three representatives from each state. The President of the United States will designate a representative of the United States who shall be an ex-officio member and act as Chairman without vote. Article VIII-D provides for the settlement of controversies as follows: "In cases of a divided vote on any matter within the purview of the Administration, the Administration may, by subsequent unanimous vote, refer the matter for arbitration to the Representative of the United States or other arbitrator or arbitrators, in which event the decision made by such arbitrator or arbitrators shall be binding upon the Administration."

LOCAL UNION ELECTION ADMINISTERED BY AAA

BY

J. NOBLE BRADEN

Tribunal Vice President, American Arbitration Association

"In order to insure complete impartiality in the conduct of the election, including nominations, the AMERICAN ARBITRATION ASSOCIATION, a national organization of accepted responsibility, has been designated to supervise the conduct of the election, to count and announce the results of the vote, and to specify the place where the voting shall take place."

The above is a paragraph from a letter by Philip Murray, President of the United Steelworkers of America-CIO, Inc., to Members of Local 302, under which the Association was called upon to serve as an impartial administrator. Many times over the past dozen years the Association had been named by agreement of Union and Management to administer the determination of a collective bargaining agency, but never before had it accepted the role of administrator of an election of Local Union officials. The responsibility was undertaken only after a conference with the officials of the International Union, and in the belief that the Association could perform a service to the members of Local 302 and, it was hoped, bring about a peaceful settlement of a dispute which had existed for more than two years within the Union ranks. The Local represents the employees of the New Kensington, Pennsylvania, plant of the Aluminum Corporation of America.

After a survey of the situation and discussions with representatives of different groups within the Union, as well as with persons in the community of New Kensington, a plan for the nominating meeting and the election was prepared. In accordance with its usual practice the Association sought a member of the National Panel of Arbitrators who would inspire confidence and had the competence to supervise such a proceeding. There were two features in connection with Mr. Murray's request: one, that the Association arrange for the conduct of a meeting of the Union at which nominations for officers could be made; and the second, that it administer the actual election and counting of the ballots. The Honorable Henry X. O'Brien, Judge of the Court of Common Pleas of Pennsylvania, presiding in the county adjacent to New Kensington, Allegheny, was invited and

accepted the designation to act both as the presiding officer of the nominating meeting and as the supervisor of the election and the arbitrator of any disputes that might arise in connection therewith.

As a result of the survey, it was determined that the meeting for the nominations of officers of Local 302 should be held at the New Kensington High School Auditorium in order to have available the largest meeting room in New Kensington and thus afford an opportunity for a large proportion of the members to attend the meeting. The High School Auditorium's capacity is 1,500 and the Union Hall, only 400. It was further determined that in order to afford the greatest opportunity for all members of the Union to vote, polling places should be located at all the entrances to the plant in addition to the polling place at the Union Hall. This is similar to the plan which has been used for many years by the National Labor Relations Board and by the Association in conducting elections for the determination of a collective bargaining agent.

The Board of Education of New Kensington was glad to cooperate and make available the High School Auditorium. The officials of the Aluminum Company of America agreed to change a Company policy which previously had determined that no Local Union elections could be held on Company property and permit voting at the Company gates, by reason of the fact that the election was to be conducted by the American Arbitration Association—with the understanding, however, that no voting would be permitted on Company time. The Company also agreed to post announcements, prepared by the Association, on all plant bulletin boards of both the nominating meeting and the election.

On July 29th, the date designated by Mr. Murray for the nominating meeting, Judge O'Brien presided over the meeting in the New Kensington High School and nominations for president, vice president, recording secretary, financial secretary, treasurer, guide, inside guard, outside guard and three trustees were duly made. Prior to the meeting, in addition to the posters that had been placed throughout the plant and in the Union Hall, advertisements had appeared in the two local newspapers, *The Daily Dispatch* of New Kensington and *The Valley Daily News* of Tarentum. Announcements also were made over the local radio station and news stories concerning the meeting appeared in the papers. The meeting was concluded in an hour and one-half and was hailed by those present, as well as

by the press the next day, as being the most peaceful and expeditious meeting held by the Union in a long time.

On Saturday morning, Judge O'Brien conducted a conference of the candidates nominated the night before, or their representatives, and read the plan for the election and asked for comment. To summarize, the plan provided that the polls would be open at the Union Hall, as provided in Mr. Murray's letter of June 6th, from 12:01 A. M., August 9th to 12:01 A. M., August 10th; and that polls would be established at the gates to the plant to be opened at 6:00 A. M. and be available for voting at the changes of the shifts and during the luncheon periods.

The ballot would be one similar to that in general use in the State of Pennsylvania with a number on a corner which would be torn off before the voter deposited it in the ballot box.

The position of the candidates for the various offices on the ballot would be determined by lot.

Voters would be permitted to vote at the Union Hall provided they exhibited their Union card and their names appeared on the eligible list of voters supplied by the Union, as members in good standing. Voters at the Company gates would be permitted to vote upon exhibiting their Union card and the clock card stub indicating that they were employed in the current period, and provided that their names appeared on the list of eligible voters.

Two copies of the list of eligible voters were to be available for examination by any Union members at the Union Hall from Monday, August 1st, through the day of the election.

One watcher for each candidate for president would be allowed at each of the polling places during the casting of the ballots and two watchers for each candidate for president would be allowed inside the counting area when the ballots were counted at the Union Hall.

The counting of ballots would take place at the Union Hall immediately following the closing of the polls at 12:01 A. M., August 10th.

Two-thirds of the space in the Union Hall would be available for any Union members who desired to attend and watch the count.

Posters announcing the election and voting places and hours, as well as sample ballots, were posted throughout the plant and at the Union Hall the week before the election. Advertisements appeared in the local newspapers the day before the election. News stories were also carried by both the local press and the Pittsburgh news-

papers. Radio announcements of the election were made by the local station in New Kensington.

One minute after midnight Judge O'Brien declared the polls open at the Union Hall and voting began. At 6:00 A. M. the polls were opened at four of the Company's gates at the main plant. An additional polling place was opened at 7:30 A. M., at its shipping point, Logan's Ferry. Eighteen poll clerks in all served in the election at the various polling places, recruited from the Association's headquarters and branch offices, together with some members of the National Panel of Arbitrators and members of the faculties of the University of Pittsburgh, the Carnegie Institute of Technology and the Pennsylvania College for Women.

At 12:01 A. M., August 10th, at the Union Hall, Judge O'Brien declared the polls closed. Immediately thereafter each ballot box was placed on a large table in view of an audience of approximately 100. The Judge unlocked the boxes, seals were broken and the boxes opened and emptied of the ballots on the center of the table. The four watchers examined each box to ascertain that all ballots had been removed therefrom. When the six ballot boxes had been emptied the ballots were mixed and then the count began under the direct supervision of Judge O'Brien and in the presence of four watchers who were in constant circulation around the counting table and in direct view of the members of the Union outside the rail.

Judge O'Brien invited the four watchers to check the questionable ballots and unanimous agreement was secured on the disposition of all such ballots. The ballots found to be valid were returned to the counters and the other ballots retained by Judge O'Brien during the counting of that office.

When the count was completed the figures were handed to Judge O'Brien who thereupon ascertained whether the count was correct—adding the totals found to be cast for each of the candidates with the total of void and blank ballots. Following his approval of the count he announced the vote which was chalked on a black board for all to see. The same procedure was followed for each of the officers to be voted for with the exception of the office of trustee.

The count of the ballots cast for the candidates for trustee was made by calling off the names and tallying the votes cast inasmuch as there were 13 candidates and 3 to be elected.

The counting of the ballots was completed at 6:30 A. M., August 10th.

Judge O'Brien during the night had entered on the forms prepared for that purpose the result of the count for each office as it was completed and at 6:45 A. M., having entered the count for trustees, signed the certificate setting forth the votes cast and certifying the election of the officers.

On the night of the nominating meeting *The New Kensington Daily Dispatch* carried an editorial on its front page urging all members of the Union to attend the nominating meeting and to vote at the election. The editorial stated: ". . . This is the first step toward returning custody of the Union to its membership after nearly 18 months under an administrator.

"Even worse, perhaps, than Company-Union disputes are internecine controversies between labor groups or units within a local. We feel that strife within Local 302 has had more than union significance; that it reaches down into the very roots of this community's welfare. . . ."

The editor then commented on the American Arbitration Association as an impartial agency and on Judge O'Brien of its Panel of Arbitrators, stating that the Judge "is highly competent for the post—being one of the state's outstanding jurists, known for his fair, impartial attitude." The editorial closed with a statement that "The decision can affect the affairs of the Union—and the very lifeblood of our community—for years to come."

The object of Mr. Murray in providing for the administration of the election by the Association was to bring in an agency with which all groups within the Union could cooperate in arranging for and securing a completely impartial determination of who were to be the new officers for the Union.

Judge O'Brien at the conclusion of the election expressed his gratification and appreciation of the splendid spirit demonstrated by all concerned and the fine cooperation accorded him and the American Arbitration Association, which he believed would insure a successful administration for the new officers and peace and harmony and success for Local 302. The experience of an election without a single challenge augurs well for the future of the Union and gives the American Arbitration Association the satisfaction of once again assisting in the creation of good will.

AUTOBIOGRAPHY OF A COMMERCIAL DISPUTE

I am about to be born. My parents are the two parties to a commercial contract out of which they expect to enjoy the pleasures of profit and achievement. They hardly as yet suspect my existence but I shall prove to be an unwelcome child and one of precocious attainments.

At the moment I am no bigger than a mosquito which carries the deadly virus of yellow fever. But I am equally dangerous, for while it attacks the body I attack the balance sheet. I generally appear first as an argument over the terms of the contract and the fact that no one pays very much attention to me in this ameba state makes my growth phenomenal. By attracting to myself the attributes of desire, avarice or greed, I soon assume more importance than my parent contract.

Once propagated by my parent parties, I set out on my path of destruction. I set great store by my powers to generate ill-will and confusion, for that is the warmth upon which I feed. I delight to attract to myself the friends and associates of my parents, who have now become antagonists, and to divide them into opposite camps, thereby spreading my influence throughout a plant or a group or a whole industry. I am necessarily an enemy of friendship and understanding and tolerance, for in order for me to live, wills must clash, interests collide and lies be spawned. Few discover my real character until it is too late.

I am universal, for the contract has never been written which makes me impossible. I lie in wait in ambiguous phrases, in double-dealing words, in unfair terms and in careless or designed misstatements in every contract.

I am treacherous for I bite the hand of industry that feeds me. I bide my time and strike when I can do the most damage—when the commodity named in the contract is about to spoil, when delivery of material is most essential or when a continuance of friendship is most necessary to future trade relations.

I am disloyal for no one knows better than I, from age-long experience, how I can disrupt or ruin those who have trusted each other. Men are only beginning to suspect, in the revelations of modern warfare, how important I am to the enemies within a nation.

For, wherever I exist, I weaken the morale of those caught in my meshes and they more readily listen to emissaries of evil against the nation that shelters me.

I am legion—not a heart is immune to the hate which I can create. And, I am taken too much for granted, for no one suspects my potentialities until it is too late. I astonish myself by the speed of my power. I am a mere speck on the horizon one day and the next day I am upsetting a business or a trade. I need only take the form of a summons to court to spread terror in an organization. I need only assume the cloak of an investigation to bring to the surface long slumbering anti-social forces. Men need only whisper my name to unnerve the happy man of yesterday with fear for tomorrow.

Light hardly travels faster than I do, for my handmaidens are gossip, rumor and distortion. A thousand eyes and ears are in my service. I hardly recognize myself when the imagination of the public finds me a tender morsel of gossip. And if I can by chance or design draw into my vortex the great in name or deed or in worldly goods, my reputation is forever made.

Notwithstanding all of these defects in character, men lavish millions of dollars on me each year. They dress me up for parade in public courts and employ the great in law to attend me. They doughtily defend me up to the very doors of perjury. Men cast aside friends, relatives, business associates, sometimes honor itself, in order to embrace me. They gamble heavily on me only to find they have already lost, for being really evil, I can confer no lasting benefits on anyone.

I sometimes think that I am the power I am today because people can afford me. Nations with unlimited tanks and planes, people with unstinted wealth and resources, businesses with large reserves, companies with heavy orders ahead,—all can afford to take me for granted and consider me inevitable. They even set aside reserves, counting upon the certainty of my appearance and the necessity for my support.

At other times, I think my power lies in the many disguises I can assume. Sometimes, I am camouflaged as a demand for justice, or I appear in the role of vindication, or I am an inalienable right to property or some other thing of value. Not infrequently I appear as being in the public interest or public welfare. I thus obscure my real character which is always to destroy.

Old as I am in history and tradition, I never cease to wonder why I have never been studied and analyzed by scientists in human behaviour and welfare, with a view to my elimination, isolation or control. It is really not a more hopeless task than when scientists were confronted by tuberculosis, diphtheria and cholera. Left to myself, I breed wars as germs create epidemics and I destroy nations as they did human life. For I, also, am contagious. Quarrels among members of an industry eventually make it a litigious industry. One dispute leads to another until it enmeshes whole groups. Unsettled disputes spread their virus until, it is said, that next to war itself, litigation lays the heaviest burden upon modern civilization.

What Should You Do . . . after a divorce, about furniture stored while the couple was married? . . . about handling, to the satisfaction of both union and management, an irrepressible teenager who has put tacks in his superintendent's shoes? . . . about settling diplomatically a dispute between a producer and an actor who allegedly did not know his lines?

"Pick Your Own Judge," says Irwin Ross in the July 1949 issue of *Pageant,* and enjoy an informal, inexpensive and expeditious hearing at the American Arbitration Association. And nothing is too big or too small: the amounts involved in controversies have ranged from a $3.29 grocery bill to a damage claim of $2,300,000 entered by the Netherlands government against an American munitions manufacturer. "Next time you have a disagreement with your tailor, a collision with your landlord, or even a dispute with your mother-in-law that threatens to get out of hand, just call on the AAA," says Mr. Ross; "they're always ready to help. "

COMMENTS ON THE DOCTRINE OF ACCEPTABILITY OF LABOR ARBITRATION AWARDS: MEDIATION vs. ARBITRATION

BY

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AMONG the many facets of the post-war developments in the field of labor arbitration has been a growing belief by some advocates of the doctrine that an arbitration award must be mutually acceptable to the parties themselves in order for the arbitration process to be an effective and satisfactory terminal point in the grievance procedure. Restated in the words of one such distinguished advocate: ". . . . mediation has been developed as a part of the arbitration process . . ."[1]

To those of us dealing with the practical day-to-day application of *ad hoc* arbitration as the technique for the peaceful settlement of grievances, there is a growing concern about the advocacy of such a doctrine. Brief analysis of the writings and utterances of the proponents of this so-called "mediation approach" will disclose the illogical, if not impractical, nature of the premises upon which this doctrine is grounded.

It is argued by these proponents that since the labor contract ". . . reflects only a partial or an inconclusive meeting of the minds . . . grievance settlement becomes an integral part of agreement-making . . . (and therefore) arbitration is an adjunct of the collective bargaining process."

The fallacy of this contention becomes self-evident on its face because the modern labor contract, at least in most instances, is not a "partial or inconclusive meeting of the minds." It indeed would be a sad commentary upon the vast corps of well-trained and experienced negotiators and labor contract draftsmen if this premise were true. No doubt it is true that in the past there have been numerous labor contracts that have failed to spell out the intentions of the parties with respect to specific items attempted to be covered by the agreement. Likewise, there have been contracts that com-

[1] Address of George W. Taylor, "Effectuating the Labor Contract through Arbitration", before the Second Annual Meeting of the National Academy of Arbitrators, Washington, D. C., January 14, 1949.

pletely refrain from any reference to a given subject which the parties may have discussed but never specifically provided for when the contract was actually framed. Obviously, some such situations may exist today, but in this day and age when the science of collective bargaining has attained a reasonable degree of experience and development, one is apt to raise his brows at hearing that contracts of this type at best are no more than inconclusive statements of the intentions of the parties. It is beyond the realm of credulity to ask people experienced in the highly developed field of modern management-labor relations to believe that most labor contracts are mere skeletons or topic sentence outlines of their agreements, to be filled in or expanded upon or renegotiated later with the aid of the arbitrator during an "arbitration" arising in the post-agreement-making period.

It is patent that not all the working terms, conditions and even the "established practices" can be physically incorporated in a labor contract. However, an examination of the modern labor agreement discloses that the overwhelming majority of such agreements today are fairly complete and constitute well-integrated documents spelling out a conclusive meeting of the minds. In this connection, it is interesting to note the pertinent remarks verifying the extensiveness of the current practice in good labor relations of spelling out the "whole agreement" in preference to provisions of an inconclusive or partial nature.[2]

While many would like to believe, for good labor relations reasons, that grievance arbitration is an "adjunct" of the collective bargaining process, unfortunately in most instances it is not a part of that process. Careful analysis of the "mediation approach" as distinguished from the "judicial approach" disproves that thesis. Probably the best statement here applicable is the clear and authoritative statement made by a well-informed authority on this subject who justifiably states:

> "Conciliation is the act of a third party bringing together the two parties in dispute for negotiation and for settlement of the dispute.
>
> "Mediation is the process whereby the third party not only brings the two parties together but actively participates

[2] Remarks of J. Noble Braden, Tribunal Vice-President, American Arbitration Association, before Arbitrators' Conference—New York and New Jersey —March 1, 1949, at the Town Hall Club.

in the negotiation, generally consulting with each of the parties separately and, by persuasion, effecting a compromise acceptable to both. Conciliation and mediation are often merged into a single process.

"Arbitration, on the other hand, is a judicial process. The arbitrator is a judge. The parties agree to accept his decision as final and binding. The parties are required to submit evidence, and each is permitted to cross-examine the evidence of the other. Upon the evidence submitted the arbitrator makes his award.

"From this differentiation it is apparent that an arbitrator cannot be a conciliator at one stage in the proceeding and then become a mediator, and then change into a judge. An orderly proceeding for the presentation of evidence, calling of witnesses, and receipt of exhibits pertains only to an arbitration. For example, when there is a threatened strike or lockout, the conciliator or mediator has the immediate responsibility, not of administering justice, but of avoiding that disaster. He must be prepared to make reasonable suggestions with a view to compromising. He must meet informally with the parties and become part of the bargaining process. He must undertake to obtain the best possible terms as a basis for maintaining industrial peace. There are no rules of procedure to guide him, for each situation differs from the other. Mediators are not clothed with authority to make binding decisions. When the mediator has reconciled the views and demands of the parties to the point of continuing the relations of management and labor his task is done. In that process he may have made suggestions or expressed views which might affect adversely the degree of impartiality required in an arbitrator acting as judge."[3]

In considering the characteristics of the duties of mediator and conciliator, as distinguished from those of arbitrator, it is obvious that conciliation and mediation are processes of settlement that must be fully tried and exhausted by management and labor and that arbitration, by its very nature, should and must be the last resort. It is only when these post-grievance procedures have failed, that the dispute should then be submitted to an impartial judge in an arbitration proceeding.

Notwithstanding the existence of the very practical and historical reasons for separating and distinguishing the "mediation" process

[3] Frances Kellor, *American Arbitration*, New York, 1948, pp. 84-85.

from the "arbitration" proceeding, there may be some justification for the application of Dr. Taylor's "doctrine of acceptability." To the extent that it can be applied by a permanent "impartial chairman" or "umpire", created under an industry-wide collective bargaining contract or by an agreement involving a large single employer operating on a multi-plant basis, the doctrine of "acceptability" may be sound. In this situation, that is exactly what the parties want; that is what they expect of their "impartial chairman" and that is perhaps the reason why they choose him as their "impartial chairman" or "permanent umpire." However, in the case of the *ad hoc* arbitrator who changes from case to case, the parties do not accept mediation or conciliation or the making of valued judgments involving "industrial statesmanship." In the case of the *ad hoc* arbitrator, the parties do not expect the arbitrator to be consistent in his rendition in a series of decisions affecting a series of employers and unions. It seems that the proponents of the permanent arbitrator or "impartial chairman" approach a vehicle with which we have no quarrel and overplay their argument in preaching the "doctrine of acceptability" in their attempt to play down the place of *ad hoc* arbitration in the field of industrial relations. These well-meaning advocates of that doctrine completely overlook the fact that *ad hoc* arbitration, of necessity, is the resort to a quasi-judicial process intended to finally determine a grievance that is incapable of solution by mutual adjustment, mediation or conciliation. That is the only concept that can be applied to true arbitration of a labor dispute and unless labor arbitration is construed as such, the very purpose of the arbitration process is defeated by the introduction of mediatory or conciliatory concepts.

The Republic of Haiti, as part of its program for facilitating increased commercial activity, has concluded an agreement with the International Automotive Electric Corporation for materials to be used in modernizing and expanding the nation's telephone system. An interesting feature of the contract is a clause stipulating that differences which may arise should be adjusted through the services of the Inter-American Commercial Arbitration Commission. Once again, the facilities for an expeditious and amicable adjustment of disputes through arbitration are endorsed by a Latin-American government and an international business firm.

THE VOLUNTARY ARBITRATION OF LABOR DISPUTES

BY

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ARBITRATION is not a new method of settling commercial disputes. It is not even a new device as applied to labor relations. Figures of the Bureau of Labor Statistics indicate that more than 90 percent of collective bargaining agreements in leading industries make provision for the arbitration of grievances arising under such agreements. In a wartime economy, arbitration demonstrated that it can supply effective sanctions to enforce its awards, within a democratic framework, preserving the interests of both management and labor. There is no question but that arbitration will be resorted to, more and more, as an industrial technique.

Governmental statistics, newspapers, data compiled by the labor relations services and figures of the American Arbitration Association, give overwhelming proof of the universal acceptance of arbitration in labor disputes. Yet there is an astonishing lack of information about what arbitration actually is. This is apparent from even a cursory reading of current periodicals and from casual conversations. This ignorance exists not only in the lay public but also among those within the industrial relations field.

The term "arbitration" is frequently used interchangeably with conciliation or mediation. Actually, it is neither. Both of the two latter processes seek to achieve a settlement through mutual agreement of the parties; mediation, through direct bargaining of the parties, and conciliation, through bargaining of the parties directed by an outside individual. Arbitration should not be conceived of as being a bargaining process at all. Actually, it is a judicial process. It has been defined as "the settlement of a controversy by a person or persons chosen or consented to by the parties who agree in advance to accept the decision of the arbitrators." The effect of an award in arbitration, therefore, is similar to the effect of a decision in a court of law. It is binding on all parties. Each presents its evidence, and on the basis of such evidence the arbitrator makes a decision. The parties having voluntarily agreed to arbitrate are bound

to accept and carry out the decision. The award of a valid arbitration may be enforced through the regular agencies of the courts, just as a decision of the court itself.

The resort to arbitration has been established in commerce for a far longer period of time than in the field of industrial relations. Commercial arbitration has behind it the experience of centuries. Business men have conducted their transactions on the basis of established trade usage and the clarification of their relations to one another by innumerable court decisions. It is only in the last ten or fifteen years that those concerned with industrial relations have been evolving a pattern for dealing with employer-employee disputes. Systems have been developed within plants for settling disputes by agreement or by submitting them to a "judge" constituted for that purpose. These methods are still flexible, taking shape from the needs of individual companies and unions. Not all of these are arbitration techniques. Many of them are.

It is necessary to differentiate between arbitration of a dispute relating to the interpretation, or a grievance arising under an existing agreement between the employer and employee, and arbitration of a controversy as to what the contents of a new agreement shall be. Arbitration of disputes arising under an existing agreement has found much wider acceptance than arbitration of the terms of a new agreement. The former constitute the bulk of what have been referred to arbitration. Usually, these are the disputes which have been carried through the various stages of the grievance machinery set out in the contract, and involve the interpretation and application of the contract as applied to alleged violation of its provisions, *e.g.*, has an employee been discharged without "good cause"; has the employer failed to maintain "adequate washroom facilities."

In a few well organized industries, such as the coal and garment trades, arbitration has been used to settle grievances for approximately half a century. With the expansion of industry and the need for uninterrupted production during the war, the use of arbitration received considerable impetus in the solution of grievance problems. Since the war, its effectiveness has continued to be recognized. Labor initially took the lead in urging its adoption. Management feared to delegate to a third party authority to make decisions which it considered were within the scope of the managerial function. The institution of techniques which safeguards the interest of the em-

ployer has done much toward satisfying the initial reluctance which management might have had. An example of such a device is a provision in the agreement limiting the authority of the arbitrator, so as to prevent him from adding or subtracting from the scope of the dispute submitted for decision.

The arbitration of grievances or disputes involving the interpretation of existing collective bargaining agreements constitute the main number of industrial disputes referred to arbitration. Of a lesser quantitative importance but probably greater qualitative importance are the arbitrators involving the terms or contents of a new agreement between management and labor. It is quite clear that wherever possible, the formation of new contracts should result from free collective bargaining by the parties. Yet arbitration can offer valuable assistance where the parties are unable to agree. It can prevent a cessation of production and of wages while the issues are being objectively considered and decided. The problems involved in this type of arbitration are infinitely more complex than those involved in the decision of a grievance question, demanding social and economic determinations of the highest order.

An arbitration may take many diverse forms. It may be extremely informal, so long as it meets the essential requirements for an arbitration, or it may be conducted according to rules prescribed by trade usage, agreement of the parties, or those promulgated by such an organization as the American Arbitration Association.

There are two usual methods of providing for an arbitration. The first is where on the occurrence of a dispute, the parties agree to arbitrate their difference or differences. They set forth their agreement to submit their dispute in a document called a Submission Agreement which defines the arbitration to which it gives birth. This is "after the fact" arbitration, that is to say, the agreement to arbitrate takes place after the dispute between the parties has already arisen. However, once a controversy has arisen, it may be difficult for the parties to reach an understanding, even as to how their controversy is to be settled. Because of this, experienced draftsmen of collective bargaining contracts, make provision in advance for the use of arbitration in the event that a controversy should arise. Such "before the fact" agreements to submit future controversies to arbitration are called Arbitration Clauses. Such a clause can be either broad or narrow, depending on how much of an area the parties

feel they wish to leave to arbitration. The nature of the clause will vary depending on the type of industry involved and often in the prior relationship between the parties. It is important to have a well drafted clause of this type which makes provision for an expeditious culmination of the controversy and leaves no matters of procedure open for the parties to argue over once a disagreement has arisen between them.

Where an arbitration is to be commenced pursuant to an arbitration clause, both parties are entitled to notice of the arbitration hearing. The New York Arbitration Law requires that the arbitrator cause this notice to be given. The amount of notice is usually discretionary with the arbitrator, unless, under the rules of the arbitration, or by agreement between the parties, a different arrangement is made.

Generally speaking, adjournments may be taken upon the initiative of the arbitrator or the request of the parties. Under The New York Arbitration Law, the arbitrator, or a majority of the arbitrators, if there are more than one, may adjourn the hearing from time to time, upon application of either party, on good cause shown, or upon their own motion, but not beyond the day fixed for rendering the award, unless the time has been extended by written consent of the parties.

The parties may agree to waive oral hearings or testimony under the New York Arbitration Law. This is permissible, for the holding of a hearing is subject to the terms of the agreement. An example is furnished by the New York Coffee and Sugar Exchange. Wherever the arbitration is for the purpose of establishing quality or condition, the rules of the Exchange provide that samples shall be submitted for examination, and the parties not only do not appear, but are not known to the arbitrators.

Arbitrators have no authority to compel the attendance of witnesses unless such authority is expressly provided for by statute. Under the New York statute, arbitrators may subpoena witnesses if necessary. Refusal to obey such a subpoena subjects the party served therewith to the same penalty as a refusal to obey a like process in a court of law.

Arbitrators possess large discretionary powers in regulating the form of procedure. As a matter of usual practice, it is usual first for the complaining party to present his proof, and then the defend-

ing party. The arbitrator may then permit each party to question the other, or he may just hear the witnesses of the complaining party and then the witnesses of the defending party. The arbitrator may then require an explanation of the statements, may examine books, records or materials or other evidence submitted, or conduct his own examination.

It is often cited as a desirable aspect of arbitration, that the hearings are not restricted by technical rules of evidence. This is true. It is also true that awards are based on hearings and ordinarily on the taking of testimony. Under the arbitration law, all evidence which is pertinent must be accepted by the arbitrator when offered.

The key to a successful arbitration is the arbitrator. "Get a good arbitrator, and you will have a good arbitration." When the employer and the employee enter into an agreement to arbitrate prospective or existing disputes, they are entitled mutually to select the third party or parties from whom the authoritative settlement of the dispute is to come. The parties initially must come to an agreement as to the number of arbitrators who shall decide the differences between them. They may decide to use a single arbitrator, or more than one. The parties also have the choice of providing the method by which the arbitrator is to be selected.

Some of the methods which are currently used are: specific naming of a single arbitrator; selection of an arbitrator, by common agreement, upon the occurrence of a dispute; designation of independent individual or organization, to select arbitrator; selection of one arbitrator, or more, with an additional arbitrator to be named by the first arbitrators selected, or by common agreement of the parties; a panel consisting of an equal number of arbitrators selected by each party; selection of a single arbitrator, designated under the Rules of such an agency as the American Arbitration Association. None of these methods is perfect, the choice of one or another depends on the particular problems involved. Actually, the most important factor is the individual who is serving as the arbitrator.

The resolution of the complex social and economic problems which industrial disputes present, requires an arbitrator who has the integrity and background to come to a competent and impartial decision. With the increasing use of arbitration in industrial disputes, there has come into existence a body of experienced persons who devote all or most of their time to arbitration. Some are well known

to companies and unions and are selected by them directly to handle their disputes. Where the parties fail to agree on the selection of an arbitrator, they customarily ask one of the public or governmental agencies which offer such service, to furnish them with a list of available arbitrators. These organizations generally choose from among the group of persons active in labor arbitration work in the community in which the parties are located. Thus, we have in effect a body of economic "judges" to handle industrial controversies.

Almost every collective bargaining agreement entered into today, makes provision for the settlement of disputes arising thereunder by resort to arbitration. And increasingly, the content of new agreements is being left for determination for decision by impartial experts, where the parties themselves cannot come to an agreement. Modern industry, requiring an intelligent and speedy determination of disputes by methods which will preserve good will and yet be effective, has accepted arbitration. The objective now is not the acceptance of the arbitration principle by management and labor, but a dissemination of knowledge of what arbitration is, how it works, and how it can be made to serve further the cause of industrial democracy.

Disputed medical bills are arbitrable under the New York State Workmen's Compensation Law. An employer or an insurance company may request an impartial examination of the fairness of a medical bill within thirty days after its receipt. The value of the services are then decided by arbitration, either by the Medical Practice Committee when the workmen's compensation claimant resides in a county of more than one million population, or by a special arbitration committee in cases of residence in less populated counties. The latter committee consists of two physicians designated by the County Medical Society, two physicians designated by the Compensation Insurance Rating Board, and a fifth physician designated by the Chairman of the Workmen's Compensation Board. The Rules of Procedure on arbitration of medical bills provide for (1) time limits for notices (2) preparation of a calendar of cases for arbitration, (3) selection of arbitrators, (4) fixing of hearing dates and places, (5) signing of a formal submission, (6) a record of the arbitration proceedings, (7) presentation of cases, (8) forwarding of the decision, and (9) payment of the award and of the arbitration fees.

ARBITRATION IN AIR TRANSPORTATION

FIFTEEN major United States air carriers established in 1939 Air Transport Rules of Arbitration through the Air Transport Association of America. The Rules have been administered by the American Arbitration Association, which maintains special panels of aviation experts who are available to the parties when disputes arise. Examples of trade issues under the jurisdiction of such arbitrators are agreements for the mutual use of equipment and facilities, restrictions upon questionable advertising practices, standardization of flight procedures and the maintenance of adequate schedules.

A novel provision in the Rules gives the arbitrators the power to interpret inter-carrier agreements even in the absence of a dispute, thereby eliminating in many instances the causes for disputes. The spirit of confidence and good-will in such a voluntary provision creates an atmosphere of mutual trust and cooperation which frequently prevents the parties from magnifying a simple disagreement which can be settled by informal discussion into a full-grown dispute.

It is interesting to note, therefore, in the light of this unusually harmonious arrangement in the domestic air-carrier industry, that since their adoption in 1939, only one dispute has come up for arbitration under the Air Transport Rules. The controversy, which was submitted to a tripartite arbitration board in 1948, involved a claim of unfair advertising. At the close of the all-day hearing, the spirit of good will inspired by good arbitration procedure brought a request that the arbitrators withhold their decision in order that the parties might further attempt to consult with the Air Transport Association and settle the differences. At the conclusion of the two-weeks suspension period, the matter was withdrawn from arbitration and settled without an award.

In August 1949, arbitration was further advanced in the air transport industry through an agreement upon the principles of new leases of space and services at the New York International Airport. A Memorandum of Agreement between the Port of New York Authority and some of the major airlines (American Airlines, American Overseas Airlines, British Overseas Airways Corporation, Northwest Airlines and Pan American Airways) settled the controversy regarding the use of airfield facilities. The two-year old dispute between the Authority and the airlines was settled when Governor Thomas E.

Dewey intervened and, in a conference with representatives of both sides, arranged an agreement by which the lines would use the new Idlewild Airport. The following month saw Trans World Airlines add its formal approval of the master agreement.

Arbitration is provided for in cases of disputes regarding the computation of flight fees, the use of parking areas, the cost of erecting hangars and appurtenances, the cost of consolidated handling of mail and airline baggage, etc. Section 16 of the contract provides that all matters subject to arbitration shall be submitted in accordance with the rules of the American Arbitration Association.

It appears, then, that a pattern has been established in the air transport industry for arbitration which, since the establishment in 1939 of the AAA-administered Air Transport Rules of Arbitration, has contributed to the stability of the industry by providing a forum for dealing with air transport controversies peaceably, inexpensively and expeditiously.

Soviet commercial arbitration will be dealt with in two research projects: in a monograph on "Soviet Foreign Trade Monopoly," in preparation by Stanford University, Hoover Institute and Library; and in a study by Harold J. Berman, on "The Soviet Law of Foreign Trade," prepared in the Russian Research Center of Harvard University, which will contain notes on cases in the Soviet Foreign Trade Arbitration Commission. In this respect, the recent *Report of the Federal Trade Commission on International Electrical Equipment Cartels* contains an interesting note to the effect that the members of a 1930 agreement between German, British, Swiss and United States electrical manufacturers were confronted with the request of Amtorg Trading Co. to include in the orders that arbitration of disputes with Russian customers should be held exclusively in Moscow. This condition, however, was refused and members of the electric motor section agreed on August 5, 1938 "that the members have no objection to an arbitration clause, provided that it offers a fair method of dealing with a matter in dispute."

WHAT IS BEING SAID ABOUT COMPULSORY LABOR ARBITRATION

Ira Mosher, Chairman, Executive Committee, National Association of Manufacturers: ". . . compulsory arbitration offers no real assurance of peaceful adjustment of disputes. External compulsion does not eliminate misunderstandings or resolve conflicts. Unless we go to the root of the dispute and solve it on its merits as only the parties involved can solve it, compulsory arbitration can result only in a temporary truce. Where compulsory arbitration has been tried it has not prevented strikes."

William Green, President, American Federation of Labor: "Organized labor is unalterably opposed to compulsory arbitration, as are the leading spokesmen of industry. Our reasons are many and clear. Compulsory arbitration is the very antithesis of collective bargaining, and collective bargaining is the very cornerstone of economic and political democracy. It was for that fundamental reason essentially that the Supreme Court of the United States declared a Kansas compulsory arbitration law repugnant to the 14th amendment to the Constitution. The Court said: 'It curtailed the right of the employer, on the one hand, and of the employee on the other, to contract about his affairs.'

"It is clear beyond doubt that compulsory arbitration will not work in this country or, indeed, in any country with a strong tradition of democracy . . . Industrial peace will not be secured by the establishment of compulsory arbitration. Only upon the full acceptance of free collective bargaining, as an instrument of reason and equity and not of force, rests our hope for the maintenance of industrial peace."

Harold E. Stassen, President, University of Pennsylvania: "If either of these proposals (compulsory arbitration and labor courts) were enacted into law, we would be taking a very fundamental step of departure from a free economy. We would be substituting the decision of an agency of government for the decisions of private capital and free labor. It would result in partial paralysis of the preliminary negotiations as each party sought to maintain itself in a position ready for the final arbitration."

Jules J. Justin, Labor Arbitrator, Industrial Relations Consultant and Lecturer: "The use of compulsory methods to settle any labor dispute cannot endure. Legal compulsion may appear to be an easy way out for the moment, when one is faced with a serious and complex problem. . . . The evils in its wake are greater than those sought to be cured. Only through bona fide collective bargaining, aided by those voluntary processes of mediation, fact finding, and arbitration, can harmony be secured within the framework of our industrial economy."

Bureau of Labor Statistics, U. S. Department of Labor: ". . . legislative requirements for the arbitration of disputes without interruption of work have not prevented stoppages of varying degrees of severity. The seriousness of the strikes has been determined by economic conditions rather than by legislation. Private negotiations between employers and unions, supplemented by conciliation and mediation, have been the backbone of smooth industrial relations . . ."

Judge Florence Allen, in an essay published in the September 1949 issue of the *American Bar Association Journal,* referred to the dispute between India and South Africa over the latter's discriminatory laws against Asiatic citizens. Mentioning that the question had been dealt with by the United Nations General Assembly, Judge Allen recommended that such legal problems be settled by the International Court of Justice, since only in that way will world judicial order be established.

WORLD'S BUSINESS AWARD PRESENTED TO THE CANADIAN CHAMBER OF COMMERCE

On the occasion of the twelfth Congress of the International Chamber of Commerce in Quebec, on June 14, 1949, Martin Domke, International Vice President of the American Arbitration Association, presented the World's Business Award for the Advancement of Arbitration in Foreign Trade to the Canadian Chamber of Commerce. In presenting the Award on behalf of Mr. Eugene F. Sitterley, President of World's Business, Dr. Domke said:

The importance of . . . . international commerce to all nations and peoples becomes increasingly apparent with each passing day. The interdependence of national economies is no longer questioned and acts that disrupt the flow of world trade are reflected in the well-being of the peoples involved. Controversy exacts a heavy toll and differing languages, customs and laws increase its likelihood in the international sphere. In the elimination of trade disputes arbitration plays a fundamental role. It works in a positive way to reduce trade barriers and improve commercial relations.

In an effort to reduce economic waste and strengthen business relations in the Western Hemisphere, 21 American republics established in 1933 an Inter-American Commercial Arbitration Commission. Ten years later, in 1943, a Canadian-American Commercial Arbitration Commission was founded, thus making commercial arbitration possible among all the nations of the Western Hemisphere.

To encourage the development of commercial arbitration between nations, World's Business, in cooperation with the American Arbitration Association, makes an annual award for the advancement of arbitration in foreign trade. This award is presented for distinguished service in the cause of arbitration, for the promotion of its use through research and education. The award was presented in previous years to Chambers of Commerce in Mexico, Rio de Janeiro, Los Angeles, Bogota and Argentina.

The Canadian Chamber of Commerce was, to a large degree, responsible for the realization of those plans which resulted in the establishment of the Canadian-American Commercial Arbitration Commission and made possible the realization of an effective hemispheric-arbitration system. It has since rendered unusual service in the furthering of arbitration principles for the elimination of

trade disputes and been instrumental in fostering good will throughout the hemisphere.

In recognition of this very real service, for its part in the implementation of the original plans for a Canadian-American Commercial Arbitration Commission, and its constant and untiring efforts in the advancement of arbitration principles, the Canadian Chamber of Commerce has been nominated as the recipient of the 1949 World's Business Award.

Arbitration is a democratic way of dispute settlement. Its forward progress in our commercial world is another stirring example of democracy in action.

QUEBEC CONGRESS OF THE INTERNATIONAL CHAMBER OF COMMERCE

International commercial arbitration was discussed in sessions of the XIIth Congress, held in Quebec, in June 1949. Referring to the recent survey by the ICC of rules of law governing arbitration agreements, arbitrators, hearings, awards and means of their execution in 43 countries, a resolution recommended that ICC's Commission on International Commercial Arbitration "continue its task by investigating not only national legislation but also arbitration practice which is at times in advance of the law."

A further resolution welcomed the fact that "the law courts increasingly give primacy to the Rules of Conciliation and Arbitration of the ICC over the rules of procedure laid down by national law."

The session on commercial arbitration, which was presided over by Co-chairmen Emmanuel Derode, President of the French General Company of Credit, and Morris S. Rosenthal, President of the National Council of American Importers, considered the diversity of national legal systems, the enforcement of arbitral awards, education in arbitration and the progress achieved by organized arbitration where rules of arbitration play an important role. The Chamber of Commerce, Industry and Agriculture of Milan, Italy, presented a report "For a Wider Use of the Arbitration System in the Field of International Trade," which was the basis of a lively discussion in which delegates from England, Holland, Belgium, France, Italy, India and the U. S. A. participated.

LABOR ARBITRATION IN THE NEWS

Survey on Arbitration,[1] conducted by the Institute of Industrial Relations of the University of California under the direction of Dr. Edgar L. Warren and Irving Bernstein, yielded 528 usable replies from 2,000 questionnaires circulated: 114 from unions, 176 from employers and 238 from arbitrators. Complete results are not yet available, but a report on "The Costs of Arbitration" has been published, showing the following results:

Question: Do you favor that the cost of arbitration be borne by the parties rather than the government?

Reply	All	Employers	Unions	Arbitrators
yes	466(91.2%)	172(98.9%)	76(70.4%)	218(95.2%)
no	45(8.8%)	2(1.1%)	32(29.6%)	11(4.8%)
Total	511	174	108	229

Question: What do you consider a reasonable (per diem) fee for arbitrators to charge, in addition to expenses? (Replies are averaged for each group.)

Reply	All	Employers	Unions	Arbitrators
contract cases	$88.10	$88.62	$67.54	$95.40
grievance cases	71.94	74.99	56.99	76.00

Question: Rank the following factors in order of preference in determining the (labor) arbitrator's fee. (Replies are on the basis of first rankings.)

[1] See *Arbitration Journal*, N. S., vol. 4, p. 132 (1949).

Reply	All	Employers	Unions	Arbitrators
general standards	74.0%	86.5%	54.0%	74.7%
ability to pay	11.0%	4.1%	29.2%	7.1%
number of employees	1.4%	1.8%	2.7%	0.4%
importance of issues	8.5%	2.9%	10.6%	11.6%
others	5.1%	4.7%	3.5%	6.2%

When Is an Employee Not an Employee? This question, around which revolves a substantial number of labor arbitrations, was dealt with in the July 19, 1949 *Executive's Labor Letter,* wherein it is declared that the cause of many such disputes stems from the use of contradictory definitions of the term "employee." According to the article, employers regard any person working for wages as an employee. Therefore, they regard the employment terminated when such work is interrupted or ceases. Although this definition has been modified somewhat by requirements of the Labor Relations Act with respect to certain basic rights of strikers, it still constitutes the employer's basic approach. Unions, on the other hand, define an employee as: "a person who possesses seniority rights under a labor agreement."

Both definitions, said the author, seem simple statements of fact, but their basic contradictions lay the foundation for disputes over payment for holidays or vacations. For example, even collective bargaining agreements which provide for such payment to employees on the company's payroll as of a certain date seldom define further what is meant by "employees," and there is room for disagreement which may ultimately have to be settled by arbitration. The solution offered as most effective is the setting up of standards for eligibility, including a statement as to whether laid-off employees are to be covered by the agreement, and the avoidance of loose verbiage with respect to the term "employee (e.g., "employees on a leave of absence" or "laid-off employees"). Thus, once again, we see that including a precise definition of terms in an agreement can help

avoid disputes or, if they are not avoided, can assist the arbitrator in his determination of the true intention of the parties.[2]

How to Settle Labor Disputes was discussed in the July 15, 1949, *U. S. News and World Report,* in an interview with Cyrus S. Ching, Director of the Federal Mediation and Conciliation Service. The keynote of Mr. Ching's statement was the importance of mutual understanding: "I think it's very important that labor leaders know more about the economics of the business. And I think it is equally important that management know something more about the difficult political and other problems of the responsible labor leader."

Expressing his belief in direct negotiations as the most desirable course, Mr. Ching said that before mediation can be successful, the parties must earnestly desire to settle the matter. Thus, only 19% of the disputes of which notice has been received were actually mediated, and Mr. Ching did not believe sufficient service had been rendered unless "we have made some affirmative contribution to the betterment of labor relations between those parties for the future."

Integrity and impartiality, he believed, are the primary qualifications for a mediator, who must be able to inspire sufficient confidence so that the parties will express to him their true intention, that is, the true limits to which they will go in granting demands. Mr. Ching compared mediators to brokers, not acting in the interest of either company or union, but rather in the interest of the American people. Likewise, labor and management should act more like salesmen: "I don't think that a salesman who found a purchasing agent didn't want his products would make speeches about him, or put it in the papers, or throw around handbills about what a bad man he is. I wish that both sides would do a little more selling."

Pilots' Seniority Grievances, based on employers' seniority lists, are being handled by the Air Lines Pilots Association's Legal and Conciliation Department through the following procedure: Upon notification of a grievance by a pilot, ALPA headquarters arranges a hearing. If the case is brought as far in the grievance procedure as the Pilot's System Board of Adjustment, notice of the hearing is sent to any pilot who would be adversely affected in the event that the aggrieved pilot should win his case. All pilots with a material interest in the case are given an opportunity to be heard.

[2] See "Labor Arbitration in the News," *Arbitration Journal,* N. S., vol. 4, p. 128 (1949), and Jules J. Justin, "Arbitrating a Wage Dispute Case," *Op. cit.,* vol. 3, p. 228 (1948).

Grievance Arbitration in the New Jersey Brewery industry was expanded to provide for arbitration of overwork complaints. Whereas previously only those grievances filed by workers who had been discharged or transferred were subject to arbitration, the new labor-management contract, involving 3,000 bottlers and bottled beer drivers, set up machinery whereby overwork grievances automatically become subject to arbitration. Thus, a facile means was provided for the adjustment of possible charges of speed-ups while the employee remains on his job.

The Newspaper Guild of New York is among the foremost users of arbitration. Of 46 collective bargaining agreements surveyed between Newspaper Guild members and New York City publishers and news services, 27 (59%) contain AAA-recommended arbitration clauses and 12 (26%) provide for arbitration in other ways, making a total of 39 (85%) which specify arbitration as the means of adjusting disputes. Only 7 (15%) fail to provide for arbitration. Of the 27 (59%) AAA-clause users, 22 (48% of the total surveyed) specify that arbitration proceedings are to be conducted under AAA rules.

Massachusetts adds its name to the roster of states which recognize the validity of arbitration and conciliation provisions embodied in collective bargaining agreements by having approved on July 13, 1949, the following amendment to Chapter 150 of the General Laws: "Section 11. All provisions of collective bargaining agreements relating to arbitration and conciliation before public or private arbitration and conciliation tribunals shall be valid, and if the parties to such agreements agree that the determination of the tribunal on any issue shall be final, such determination shall be deemed final and shall be enforceable by proper judicial proceedings" (Chapter 548 of 1949).

A Committee on Arbitration was recently appointed by the American Branch of the International Law Association, to prepare a report and recommendations for the next Congress of the Association, to be held in Copenhagen, Denmark, August 1950. The members of the Committee are: Martin Domke, Chairman; Phanor J. Eder, Homer L. Loomis, James O. Murdock, Paul W. Bruton, R. C. Neuendorffer, Ella Graubart, Franz M. Joseph, Carl G. Grossmann and Gustave A. Gerber.

STANDARDS FOR THE PRACTICE OF MEDIATION

ALTHOUGH mediation for settling labor disputes has expanded greatly in the United States, there has been reluctance to establish standards for its practice. Each person who comes to the task or office of mediator is expected to rely upon his own resources or experience, or to gather what information he can from the many and often conflicting statements on mediation. For example, when called upon to mediate, he is not quite sure where the boundaries lie among the processes of conciliation, inquiry, mediation and arbitration. That each process is governed by principles quite distinct from those governing the others and that it is often perilous to mix them indiscriminately is not a generally accepted belief.

It is, therefore, encouraging to find a Manual for Mediation and Emergency Boards, submitted by E. B. Peterson, Director of the Department of Labor and Industrial Relations, Territory of Hawaii, laying down standards of practice for mediation, in the following terms:[1]

The Function of Mediation.

> The mediation process, generally speaking, is one in which a third party seeks by direct intervention to bring the two parties to a dispute to resolve the issues in disagreement. A mediator has no authority or power over the parties to require a settlement. He merely offers his services and seeks through his good offices to find an answer that will meet the needs of the two parties. He does not take sides in the dispute, nor does he tell the parties what the answer is. He may suggest answers to the problem. He may seek to persuade the parties that his proposals are reasonable and workable, but he must not force his suggestions on them. The parties must be convinced and must voluntarily work out the answer. Proposals suggested by the mediator are for discussion purposes only. They must not be taken as the mediator's position on the issues but merely his draft of something which he thinks the parties might be willing to accept as reasonable, or might amend to meet their needs.

[1] *Manual for Mediation and Emergency Boards*, Under the Hawaiian Public Utility Labor Act, Ch. 73, Rev. Laws of Hawaii 1945 (as amended by Act 53, L. 1947), prepared by Dr. Harold S. Roberts, Acting Chairman, Department of Business and Economics, University of Hawaii.

The mediator should be well informed and should offer assistance and guidance to the parties on matters of fact. Where he does not have the information he should be able to obtain it for the parties. The mediator must not let his own feelings about the problem limit his efforts to find a workable solution. Taking sides is always easier than sitting in the middle. A mediator does not take sides. He may point out that the record may not add up and ask for further information to clarify the situation, but he must display tact and restraint to keep from showing either side that it is obviously wrong on some point. Situations may arise where the mediator feels that the person he is talking to wants an opinion on the equities in the situation. In such instances, and not in the presence of the other party to the dispute, it might be helpful to point out the weakness of the position of the particular party. Even this is not always safe. Occasionally either side may want some "fatherly" advice, but when it comes it is resented, and the mediator may be put down as "hostile" or "unsympathetic." It is generally safe to refrain from giving advice, even if solicited.

Mediation is not a substitute for collective bargaining. An agreement entered into by the parties through conference and negotiation is by far the best known method to handle the problems of labor and management. The employer and employees must live with that agreement, and what they agree to voluntarily will have the best chance of satisfying the needs of both. At best the mediation process is an adjunct to collective bargaining, just as a grievance machinery terminating in arbitration is an adjunct to the collective bargaining process. Where the collective bargaining machinery is sound, there is relatively little need for carrying any grievance to arbitration. Where differences exist as to the meaning and application of the contract the parties can, and do, in most instances, find an answer to the problem. In rare cases issues are submitted to an outside party.

A clear distinction, however, must be drawn between the functions of an arbitrator and that of a mediator. The arbitrator has the authority and responsibility to decide issues. He must act pretty much as a court does and decide the case on the basis of the merits and the equities. An arbitrator does not compromise issues; he decides them on the basis of the facts before him and on the full record of the case. In most cases, he must decide what is black and what is white. He must give the parties an answer to their

problem, and he is circumscribed by what the parties submit to him (the scope of the submission) and the language of the contract. Occasionally parties submit new contract terms to an outside arbitrator. Under those circumstances, he does not determine who is right and who is wrong but what is practicable under the circumstances and what the parties have asked him to decide. An arbitration award, if properly tried, is generally enforceable in the courts.

A mediator, on the other hand, has no power to decide anything. His suggestions and recommendations, where he offers them, have no authority to bind and are not enforceable. The only power he can wield is the power of persuasion. His suggestions carry weight only insofar as the parties assign them any weight. If the parties have confidence in his integrity and impartiality, they may carry substantial weight. If he is biased and unreliable and does not understand the problems involved, his suggestions and recommendations are without substance.

From Diamonds to Pig Iron. "The Editor Chats With His Readers"—a column in the June 1949 *Personnel Journal*—describes a visit to the American Arbitration Association in New York as "most interesting. . . . The AAA has for many years been serving industry in arbitrating not only labor disputes but also commercial contracts and foreign trade contracts. Thousands of unions and industrial and commercial companies have availed themselves of this service. The Association maintains a list of 12,000 names of persons willing to serve as arbitrators. They are a group who are experts in everything from diamonds to pig iron. No matter what the subject of dispute, authorities in the particular field are available for an appropriate AAA panel."

Relative Importance of Criteria specified for consideration by the arbitrator was held determinable solely by the arbitrator under a submission silent as to weighting factors. The agreement to submit this wage dispute to arbitration declared that the parties would be bound by the award "upon the understanding that justification for an increase, if any, shall be based on the following considerations (listing five criteria) and that the arbitrator shall show in his report how they affect his award." Following a disagreement between the parties during the hearing as to the weight which should be given the five criteria, the arbitrator declared in his award: "As the Arbitrator reads the stipulation, he is required to determine whether a wage increase is justified by considering only the factors listed therein. On the other hand, it does not appear that all of the factors must necessarily be considered of the same or equal importance. Rather, their relative importance is for the Arbitrator to determine. He is merely cautioned not to consider any other factors."

Seniority Rights of Supervisory Employees could be determined under a submission by the arbitration board, and not only the question whether such rights were within management's prerogative to determine. The agreement read: "The question submitted is: Seniority of supervisors of production and maintenance employees who have been promoted from production and maintenance jobs and who have returned or may return to production and maintenance jobs." The company contended that the issue to be arbitrated was whether it was for the company to determine the seniority rights of its supervisory employees, that the board may not write a clause into the contract defining those rights, and that it intended to submit to arbitration only the question of its prerogative in connection with this issue. The board held, however, that the issue was submitted "without limitation," and therefore "the board is authorized to make an award on the merits of the case . . . ."

Delayed Request for Arbitration Was Held Timely, although it exceeded the limit of ten days following the final step in grievance procedure set by the agreement. The final step was taken August 2, 1948. On August 14, a letter was sent advising the employer of the dissolution of Local 13013, original party to the agreement and

of the formation of successor union Local 1 as of August 7. The employer refused to recognize Local 1, and an election was conducted by the National Labor Relations Board, which, on January 18, 1949, certified Local 1 as the collective bargaining agent for the employees formerly represented by Local 13013. On January 20, the employer recognized Local 1 as legal successor to Local 13013, and on February 7, a supplemental agreement was executed, substituting Local 1 for Local 13013 in the original agreement. The following day, Local 1 requested that an arbitrator be named.

The arbitrator held that "the reasons for establishing time limits in processing grievances are sound and unassailable. These time limits . . . are a vital and integral part of the grievance procedure and collective bargaining," and, as such, are generally upheld. However, the arbitrator found that the union's request for arbitration, made on the day following its victory in the election, was timely under a contract to which it succeeded as a result of the election, and that these unusual circumstances constituted an exception to the established rule upholding time limits in processing grievances.

Payment for Time Spent at Arbitration Hearings was denied under a contract which directed the company to make such payment for "time lost during employee's working hours by members of the Union Grievance Committee . . . in the settlement of grievances on company property during working hours." The arbitration provision read: "Any grievance that is about the interpretation and application of a particular clause of this Agreement, or that alleges violation of the Agreement may (subject to the final paragraph of this section) be submitted to arbitration within 15 days after the last step in the grievance procedure . . ." Although, as the arbitrator stated, it would often seem that a provision for arbitration might well be considered inseparable from the grievance procedure generally, this agreement designated no official function for the grievance committee under the arbitration clause, and, in the language quoted, a line seems to have been drawn clearly between grievance procedure within which the grievance committee functions on the one hand, and arbitration procedure where no mention is made of the grievance committee on the other hand.

Fixing Rates of Pay for New Job Classifications was held arbitrable under a contract providing that such wage rates should be

subject to "discussion and mutual agreement" between labor and management. The arbitrator interpreted this to mean: "There is contemplated . . . that there will be a mutual agreement on the wage rate, and a discussion of the proposed rate of pay is not enough to satisfy this requirement of the agreement. Where no agreement is reached, there exists a dispute . . ." which is subject to settlement by arbitration as provided for elsewhere in the contract. Also, employer's reliance upon a contractual provision forbidding wage reopening as a bar to arbitration here was held untenable by the arbitrator since the new rates were not part of the contractual schedule to which the reopening ban applied.

Restricting the Work of lumber checking to clerical employees, as distinguished from production employees whose job it had been previously, was held an arbitrable issue. To the company's contention that changing an assignment of duty in order to improve its methods of job control was a management right, the arbitrator replied that the validity of that conclusion involved a determination of the rights of the parties under their collective agreement and hence was within the jurisdiction of the arbitrator. The company also contended that its shifting of the responsibility for lumber checking affected nobody adversely, since because of other aspects of his job, the production worker continued to receive the same higher salary he was getting when he did the checking as well. The arbitrator held that this was another issue which depended on the interpretation of the rights of the parties under their agreement and consequently it fell within his jurisdiction.

Jurisdiction of Arbitrator Over Dispute Arising During Previous Contract and submitted after its expiration was denied. In June 1947, a clause providing automatic progression from minimum to maximum rates of pay was incorporated into the agreement then in existence. A subsequent agreement was signed in October 1948, and shortly thereafter, the union discovered that the automatic progression clause was not being applied to Class B employees. The union filed a demand for arbitration, claiming that the employees who had not received higher wages under the automatic progression clause were entitled to payment retroactive under the 1947 agreement as well as under the 1948 or current agreement, and that the arbitration board had jurisdiction to grant such retroactive payment

since it had been the arbitrator named in the 1947 agreement as well as in the current one. The company contended that the 1948 agreement was complete on its face, that it made no reference regarding this issue to the previous agreement, and that consequently, the jurisdiction of the board was defined by the 1948 arbitration clause as limited to "all disputes arising out of the application and interpretation of any provision of the agreement." The board held: "Since the right to use the grievance procedure and the right to arbitrate are rights established by the agreement alone, these are rights which, unless the agreement itself provides otherwise, are coextensive with the agreement and terminate with the termination of the agreement . . . . Thus the board does not have jurisdiction (to order payment under the 1947 agreement) since the agreement which gave the board that authority is no longer in existence."

Maternity Leaves were allowed in an arbitration proceeding under a contract reading:

> "11-B. The management reserves the right, within its discretion, to grant a leave of absence to any employee presenting a good reason for same. Employees given such leaves of absence shall not lose seniority rights and shall be guaranteed re-employment within their seniority rights at their former rates of pay, plus any increase which has become effective during their absence."

The employer claimed that granting maternity leaves was not mandatory under 11-B, even though about two-thirds of its employees were women. The arbitrator declared: "With married women in its employ, it knows that in the normal course of events, such employees would give birth, and the employment of these women was made with that in mind. In the absence of a prohibition in the agreement against the granting of maternity leaves, the clause involved may not be interpreted so as to discourage the normal function of womanhood . . . . Unless Paragraph 11-B were interpreted as herein provided, the fear that bearing children would mean a loss of their jobs and all their seniority rights would tend to deter them from parenthood—a result contrary to public policy. While Paragraph 11-B leaves to the Company the discretion to grant a leave of absence, yet that discretion may not be arbitrary, vague or fanciful; instead it is to be exercised fairly and impartially depending upon the facts existing at the time."

MOTION PICTURE ARBITRATION

Once again a United States Court has commended the arbitration system established for the motion picture industry under the Consent Decree of 1940. Judge Augustus N. Hand, writing an opinion for the Statutory Court in the Southern District of New York, said:

> "The Arbitration System and the Appeal Board which has been part of it have been useful in the past and, as we understand it, have met with the general approval of the plaintiff and of those defendants who have agreed to it. In our opinion it has saved much litigation in the courts and it should be continued. Accordingly, the three major defendants and any others who are willing to file with the American Arbitration Association their consent to abide by the rules of arbitration and to perform the awards of arbitration should be authorized to set up an arbitration system and an accompanying Appeal Board which will become effective as soon as it may be organized after the decree to be entered in this action shall be made, upon terms to be settled by the Court upon notice to the parties of this action."

The opinion was concurred in by Judges Henry W. Goddard and Alfred C. Coxe.

It will be recalled that Mr. Justice Douglas of the United States Supreme Court, in the majority decision, 68 S. Ct. 915 (1948), and Mr. Justice Frankfurter, in the dissenting opinion, both commended the use of arbitration under the Decree; Justice Douglas stated that "Whether such a decision shall be inaugurated is for the discretion of the District Court" and Mr. Justice Frankfurter concurred in that determination.

The District Court has directed that a proposed amended decree is to be submitted on September 20th, and therefore at this time the final plan for the Motion Picture Arbitration System is unknown.

ARBITRATION WORKS

Commercial Arbitration was the subject of three lectures and of a ten-weeks course offered by Dean Wesley A. Sturges of Yale Law School, Chairman of the Board of Directors of the American Arbitration Association, at the University of Washington School of Law this past July. Topics of the lectures were: (1) Commercial Arbitration—Its Conception and Foundation as a System of Adjudicating Commercial Controversies, (2) The Modern Development and Use of Commercial Arbitration and Some of the Reasons Thereof, (3) An Analysis and Critique of the Laws of the State of Washington Governing Commercial Arbitration. A significant element in the series was the fact that the lectures were complimentary, open to the public, and were offered during the evenings.

Not only is arbitration being included in the curricula of more and more colleges and universities, but information about its role in improving business and trade relations is being made available to the public in the interest of the community. Evidence of how well the public is receiving this information may be seen in an editorial on Dean Sturges' activities at the Law School which appeared in the Seattle *Highline Times,* July 21, 1949. Beginning "Arbitration is here to stay," the editor points out that Washington courts have given the arbitration statutes full force and effect. Recalling that Washington was a state born of arbitration amid shouts of "Fifty-four—Forty or Fight!" the editor regards this as a logical outgrowth of Washington history. The boundary line between Canada and the United States was settled by arbitration, but "had a fight resulted in establishing the line," says the editor, "we probably would be right now maintaining heavy artillery along the border to protect that line. As it is, no soldier stands on either side to guard it. One of the finest things about arbitration is that usually the disputants part friends, rather than enemies." Referring to the Treaty of Versailles as an illustration of a fruitless attempt to settle a dispute by imposing the will of the victors upon the vanquished, the editor concluded that arbitration, "this new method of settling disputes, can well be studied by every citizen, not only as a method for adjusting his own difficulties," but as a means of preventing international conflicts by replacing "the old time method of adjusting international arguments which has never worked. Arbitration works."

INTERNATIONAL NOTES

Disposal of Controversies by Consultation Between Governments has been provided for in a number of international agreements of recent dates, when the controversies arise out of the interpretation and application of such agreements. For example, the Agreement for Intra-European Payments and Compensations of the Council of the Organization for European Economic Cooperation provides in Article 22(b) that such disputes shall be "referred by any Contracting Party to the Council which may take decisions on the question." Article 20 of the Trade and Finance Agreement between Britain and Poland reads as follows: ". . . meetings of a committee of officials representing the two Governments shall take place by agreement as may be necessary for the purpose of . . . examining any difficulties which may arise and of suggesting solutions for their removal." Conventions abolishing double taxation, which have been signed by the United States with Denmark and the Netherlands, establish means for the amicable adjustment of differences as follows: "Should any difficulty or doubt arise as to the interpretation or application of the present Convention (or its relationship to Conventions between one of the contracting States and any other State[1]), the competent authorities of the contracting States may settle the question by mutual agreement."

Conciliation has also been specified in a number of recent international agreements as the means of disposing of controversies. For example, the British-French Agreement for the Settlement of Inter-Custodial Conflicts, relating to German enemy assets, provides that "If a dispute arises between two or more Parties with respect to the interpretation, implementation or application of the Agreement, such Parties shall endeavour by every means possible to settle such dispute by negotiation between themselves, which may include the use of a mutually acceptable conciliator with such powers as the Parties in dispute may agree." Further, the recent Joint Communique on the Anglo-American-Canadian economic talks declares in Article 12: "It was agreed that any United Kingdom import regulations as they affect United States and Canadian products would be the subject of continuing review by representatives of the three governments through continuing facilities for conciliation."

[1] The provision in parenthesis appears only in the U. S.-Denmark Convention.

Today, more cognizance is being taken of the fact that controversies may well arise during the life of an agreement and that they need not be regarded as unhealthy. Differences of opinion need not lead to conflict, for if there is an amicable and expeditious composition of these differences, relationships need not be strained. Thus, the recognition of the role of controversies through provision for consultation and conciliation is a step toward universal adoption of pacific means of dispute-settlement.

Claims Settlement under Palestine Armistice Agreements. Although the larger task of political settlement of the Palestine situation falls to the United Nations Conciliation Commission established by the U.N. General Assembly, a vital achievement toward peace was made in the recent armistice negotiations. Through the activities of Acting Mediator Ralph J. Bunche, Israeli armistice agreements were signed with Egypt, Transjordan and Syria. Execution of each agreement is to be supervised by a "Mixed Armistice Commission" of seven members, three from each country and the U.N. Chief of Staff of the Truce Supervision Organization or his appointee as chairman.

The three agreements provide: "Claims or complaints presented by either party relating to the application of this agreement shall be referred immediately to the Mixed Armistice Commission through its chairman. The Commission shall take such action on all such claims or complaints by means of its observation and investigation machinery as it may deem appropriate, with a view to equitable and mutually satisfactory settlement. . . . Where interpretation of the meaning of a particular provision of this agreement is at issue (other than specified sections stipulating reciprocal rights to be recognized by the parties), the Commission's interpretation shall prevail. . . ."

Recognition was accorded the successful conclusion of these negotiations by the United Nations Security Council in a resolution of August 11, 1949, wherein the Council declared that "the armistice agreements constitute an important step toward the establishment of permanent peace in Palestine," and recommended means for their implementation.

Settlement by Arbitration of Claims Arising From Foreign Investments was recommended in an address, "Private Enter-

prise and American Foreign Policy; Essentials of Truman's 'Bold New Program'," before the Detroit Board of Commerce Foreign Trade Dinner, May 26, 1949, by an authority on international economics, Norman M. Littell, former United States Assistant Attorney General.*

In the event of foreign political contingencies causing loss of investment, a proposed Technological Assistance Authority, to be created by Congress, should take over the investor's claims, rights and assets after payment of the loss, subject to "(a) negotiations through the State Department, pursuant to the bilateral treaties, on claims for damages and compensation, (b) possible settlement by arbitration, or (c) adjudication in the International Court in a case espoused by the U. S." The proposed procedure would be invoked as a substitute for intervention, for the Authority could then proceed to attempt adjustment of serious differences through diplomatic negotiation. If this failed, arbitration was recommended.

Mr. Littell prophesied that a court of international arbitration would be created ultimately, but at present, arbitration could be invoked through existing conventions or other machinery. He recommended that bilateral agreements specify that the governments may proceed in their own rights where they have succeeded to the claim of the investor, and that the agreements make provision for a method of settling such disputes by arbitration. "Potential controversies over these private property issues could thus be graduated from the level of battleground diplomacy (intervention) to the more stable level of inter-governmental negotiations or judicial determination."

Ownership and control of the Ruhr industries is one of the far-reaching issues not only in any future settlement of the German question but also of Western European economic integration. The recent Agreement establishing an International Authority for the Ruhr, signed at London on December 29, 1948, includes in its Part VII, Article 27(b), an interesting provision for the settlement of disputes:

> "Except as provided in paragraph (c) of this Article, any two or more members of the Authority which, at any time,

* The address is reprinted in *Foreign Investment Guaranties*, Hearings before the Senate Committee on Banking and Currency on S. 2197 (August 9-10, 1949), p. 99.

believe that the course of action or the policies initiated by the Authority are inconsistent with the purposes of the present Agreement, may give notice in writing to this effect to all other members of the Authority specifying the particulars which they consider to constitute such inconsistency. Upon receipt of such notice, the members shall consult together with respect to the complaint and shall take such action as may be required in the circumstances to accomplish a solution of the matter, including, where appropriate, such arbitration or judicial settlement as may be agreed by such members. (c) A notice of complaint with respect to a course of action or policies initiated by the Authority for reasons of disarmament, demilitarization or denazification may only be given when supported by two members of the Authority other than Germany."

"**International Arbitration** occupies a very important place in affairs," concludes an article in a recent issue of *Review,* published by the American Chamber of Commerce for Italy. "It not only furnishes a practical means for the speedy and economic solution of controversies in foreign trade relations, but it also reduces the risks inherent in international commerce." (translated from the Italian)

British National Health Program now provides for arbitration of wage disputes. Prior to the establishment of arbitration machinery, doctors had feared that if any salary dispute could not be settled by direct negotiation, the Minister of Health would or could refuse to allow the controversy to be submitted to arbitration, which might result in his being placed in the position of both an interested party (on the same side as the Chancellor of the Exchequer) and the final judge. Now, however, the British Medical Association has advised its specialists and consultants to enter into permanent contracts under the health program, being assured thereby of an expeditious adjustment of any controversies over wage payments which may arise, in an atmosphere of good will among all parties.

An International Court of Arbitration is proposed for the settlement of any differences respecting the interpretation or application of an International Code of Fair Treatment for Foreign Investments drafted by the International Chamber of Commerce "unless settled within a short and reasonable period by direct negotiation or by any

other form of conciliation." Although this is a step in the advancement of arbitration, there may be no need for the establishment of a new arbitration court. The existing machinery for the administration of arbitration, especially the Permanent Court of Arbitration, may be extended to such use. In this connection, the Annual Report of the Rome Institute for the Unification of Private Law for 1948 on its Working Committee on Arbitration between Governments and Individuals merits special attention, since such efforts may pave the way to the extended use of arbitration in government-sponsored investment contracts.

Reliance upon arbitration continues to increase in inter-governmental relations. The World Meteorological Organization was one of the recent Specialized Agencies to provide for arbitration. This organization was established to facilitate world-wide cooperation in making observations in meteorology and its related fields and to expand and coordinate the international aspects of meteorological research and training. Article 29 of the WMO Convention, signed by representatives of more than forty nations, stated: "Any question or dispute concerning the interpretation or application of the present Convention which is not settled by negotiation or by the Congress (the supreme body of the Organization) shall be referred to an independent arbitrator appointed by the President of the International Court of Justice, unless the parties concerned agree on another mode of settlement."

Similarly, the Convention on the International Transmission of News and the Right of Correction, adopted by the United Nations General Assembly on May 14, 1949, provided in Article 14 that "any dispute between any two or more contracting states concerning the interpretation or application of the present convention which is not settled by negotiations shall be referred to the International Court of Justice for decision unless the contracting states agree to another mode of settlement."

Thus, arbitration is again given the opportunity to be of service in adjusting controversies which may arise under the operation of inter-governmental agreements.

POSTWAR INCREASE IN CONTROVERSIES

An ever-increasing number of controversies in the year following the cessation of hostilities created a backlog of cases, notably in the federal courts. Among the factors causing this backlog are: (1) Business firms, having concentrated their energies on production for the war effort, are now catching up on litigation put off until after V-E day. (2) A 1946 law for the first time allowed persons injured in actions for which they sought to hold the government responsible to file their suits in federal courts. (3) Growth of population or in industrial development has added to the burden of courts in some districts. (4) Increased business means more cases for federal courts, which are frequently preferred because of generally more liberal rules of evidence. (5) Workers are becoming more aware of protection given them under the law. Cases brought by injured railroad workers are about ten times the 1941 volume, and those by injured seamen more than twice the 1941 volume. (6) The government's anti-trust drive, lately stepped-up, has helped to increase the volume of cases. (7) Judges from less busy areas frequently helped out when the case load became heavy; now they are occupied with increased case loads in their own bailiwicks.

In the fiscal year 1944-45, 17,855 private civil cases were filed. By 1947-48, the number had reached 30,344, and in the period from July to December, 1948, 20,211 such suits were filed in federal courts. This alarming rate at which cases are swelling the calendars may put the federal District Courts three or four years behind schedule and Circuit Courts a year or more behind. Suits filed in the District Court of New Jersey will probably not come up for trial for two years. In the Southern District of New York, litigants may have to wait anywhere from one and one-half to three years. And the simplest suit filed now in the Eastern Pennsylvania District Court would probably not be placed on the ready calendar until the fall of 1950.

Rather than add to this increased burden on the federal courts, it would seem often advisable for the parties to an arbitrable controversy to utilize the economic and expeditious arbitration tribunals, where hearings can be held and the award made, often within a few weeks of the submission of the dispute.

THE 1943 WASHINGTON ARBITRATION ACT*

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Common law arbitration is neither recognized nor permitted in the State of Washington.[1] Arbitration proceedings and the rights of the parties thereto are governed and controlled entirely by statute.[2] By judicial interpretation, if there is no proper agreement under the statute, there is no arbitration. Once the parties do properly agree on arbitration, there can be no revocation.[3]

The adoption of a new arbitration act in 1943 is therefore of significance. This is especially so as the new act,[4] entitled *"Arbitration of Actions for Legal or Equitable Relief,"* is broader in scope, and more specific in providing for the conduct and enforcement of arbitration, than was the former act,[5] after which it was patterned and which it repealed in toto. The effectiveness of these changes cannot yet be evaluated as the new act has not been the subject of much litigation. The act is, however, similar to legislation in other states which has proven effective in promoting arbitration of both commercial and labor controversies.[6]

The purpose of the act is stated in its synopsis in the session laws.[7] It is "An Act providing for the arbitration of controversies; providing a procedure for the same; providing for judgment to be entered

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[1] *In re Arbitration Puget Sound Bridge & Dredging Co.* v. *Lake Washington Shipyards*, 1 Wn. (2d) 401, 405, 96 P. (2d) 257.

[2] *Ibid.*

[3] *Dickie Manufacturing Co.* v. *Sound Const. & Eng. Co.*, 92 Wash. 316, 159 Pac. 129.

[4] Wash. Laws 1943, c. 138, sec. 1-23; Rem. Rev. Stat. sec. 430; Pierce's Code sec. 8.

[5] Secs. 264-274, Wash. Code of 1881; Rem. Rev. Stat. sec. 420-430; Pierce's Code sec. 7339-7349.

[6] For references see Martin Domke and Francis Kellor, *Western Hemisphere Systems of Commercial Arbitration*, University of Toronto Law Journal vol. VI (1946), p. 307, 317 notes 39-43.

[7] Wash. Laws 1943, c. 138.

thereon; prescribing the duty of the courts in connection therewith; and repealing sections . . . Code of 1881." By definition, it permits arbitration "of any controversy which may be the subject of an action," which thus would include tort claims, property settlements in divorce actions (though not divorce decrees), property disputes, and price disputes. Parties entering into arbitration agreements under the act do so voluntarily. They agree to submit their controversies to hearings before arbitrators generally chosen by themselves, at which hearings they are entitled to be represented by counsel, and to abide by the awards of the arbitrators.

The new act contains three new, important provisions which provide that: (1) future as well as present controversies may be agreed by the parties to be submitted to arbitration;[8] (2) disputes involving title to real property are not excepted from the act, and therefore presumably come within it; and (3) labor controversies may be agreed to be submitted to arbitration under the act if it is so specifically provided in the written agreement. The effect of the third provision has been clouded by a recent amendment to the act,[9] which provides (a) that the "act shall not apply to any arbitration agreement between employers and employees or between employers and associations of employees," and yet further states (b) "as to any such [arbitration] agreement the parties thereto may provide for any method and procedure for the settlement of existing or future disputes and controversies." The amendment could possibly be interpreted to mean either that labor controversies may not be arbitrated under the provisions of the act, or that they could be so arbitrated if the parties so designated.

Like its predecessor, the new act provides that the award of the arbitrator is binding and enforceable through the courts. Likewise, once parties have bound themselves by contract to arbitrate and be bound by the award, such contract is enforceable and irrevocable in the absence of fraud and duress, and is subject only to defenses that are good against contracts generally.[10] This is a departure from

[8] Rem. Rev. Stat. sec. 430-1. The Code of 1881 excepted any controversy, suit or quarrel as respects the title to real estate (Rem. Rev. Stat. sec. 420).

[9] Wash. Laws 1947, c. 209: Rem. Rev. Stat. (1947 Supp.), Sec. 430-1.

[10] *Dickie Manufacturing Co.* v. *Sound Const. & Eng. Co., supra* note 3, and cases cited therein; *Puget Sound Bridge & Dredg. Co.* v. *Frye*, 142 Wash. 166, 252 Pac. 546; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 68 L. Ed. 582, 44 Sup. Ct. 274 (1924); 69 A.L.R. 816; *Pacific Indemnity Co.* v. *Insurance Co. of North America*, 25 F. (2d) 930 (C.C.A. 9th, 1928).

the common law doctrine, which was that unless mutually agreed to the award was not binding.[11]

Scope of Act. The new act provides that two or more parties may agree *in writing* to submit to arbitration any existing controversy which may be the subject of an action, and that they may include therein a provision to arbitrate any controversy thereafter arising between them, out of or in relation to such agreement. Further, such an agreement shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement. Arbitration of labor controversies has been heretofore discussed.

Whether certain facts constitute a controversy so as to make them subject to decision by arbitration within the meaning of an arbitration agreement will in all probability depend upon the agreement and the intent of the parties as evidenced thereby. Washington decisions have consistently favored and upheld enforcement of arbitration agreements.[12]. It is therefore probable that controversies arising from ambiguous agreements will be decided in favor of the party desiring to arbitrate unless there is clear and convincing evidence that the controversy was not within the scope of the agreement or that there was fraud or some other defense to it.

The scope, and thus in part the effectiveness, of the act may largely depend upon the courts'[13] interpretation of the words "controversy thereafter arising between them." Under the prior act, the court distinguished between statutory arbitration and common law appraisal. Statutory arbitration was, generally, a method of settling *existing* disputes between parties. Common law appraisal was a method of settling questions of unknowns, such as the determination of value, price, quantity, accounts, where there was no difference or

[11] *Dickie Mfg. Co.* v. *Sound Const. & Eng. Co., supra* note 3. It was also believed at common law that an agreement to arbitrate future disputes usurped the power and authority of the courts. *State ex rel. Fancher* v. *Everett,* 144 Wash. 592, 594, 258 Pac. 486, 487 (1927).

[12] *In re Arbitration etc.* v. *Lake Washington etc., supra* note 1, and cases cited therein.

[13] Rem. Rev Stat. & 430-2 reads: "The term 'court' when used in this act means any superior court of the State of Washington or the Supreme Court of the State of Washington."

dispute between the parties, but rather an unknown.[14] Such agreements for future appraisals have been held not to come within the prior act upon the ground that such factual situations did not constitute a controversy. The courts did specifically enforce such contracts, however, and awards made thereunder were given effect.[15] Whether contracts for future appraisal come within the new act remains to be seen; in the light of past decisions they would not. To encourage arbitration, the courts may, however, decide to enlarge their previous interpretations of "controversy" to include future appraisals, and thus bring such agreements within the act.

Arbitration Mandatory Under Valid Agreement. The act provides that parties to a written arbitration agreement subject to the act must submit to arbitration controversies arising within the purview of the agreement. Should a party refuse to arbitrate and commence an action, the other party may appeal to the court. If the action is referable to arbitration under the agreement, the court will stay the action or proceeding until an arbitration has been had in accordance with the agreement.[16]

Should a party neglect or refuse to arbitrate, the other party may make application to the court for an order directing the parties to proceed with the arbitration in accordance with the agreement. Upon such application, and after proper notice and service thereof, the court will conduct a hearing, and if it is satisfied that no substantial issue exists as to the existence or validity of the agreement to arbitrate or the failure to comply therewith, it shall make an order directing the parties to proceed to arbitrate in accordance with the terms of the agreement. Should the court find that a substantial issue is raised, the issue will be tried, and if the court finds that no written agreement providing for arbitration was made or that there is no default in proceedings thereunder, the motion to compel arbi-

[14] *Martin* v. *Vansant*, 99 Wash. 106, 116, 168 Pac. 990, 994 (1917); *Gord* v. *Harmon*, 188 Wash. 134, 139, 61 P. (2d) 1294, 1297 (1936); *Sullivan* v. *Boeing Aircraft Co.*, 29 Wn. (2d) 397, 400, 187 P. (2d) 312 (1947).

[15] *Ibid.*; *Hegeberg* v. *New England Fish Co.*, 7 Wn. (2d) 509, 521, 110 P. (2d) 182, 186 (1941).

[16] Rem. Rev. Stat. sec. 430-3. This provision is a codification of previous decisions. See *State ex rel. Fancher* v. *Everett*, *supra* note 11.

tration shall be denied.[17] Either party has the right to demand immediate trial by jury of any such issue concerning the validity or existence of the arbitration agreement or the failure to comply therewith.[18] To raise such an issue, a party must set forth evidentiary facts raising such issue and must either (a) make a motion for a stay of the arbitration, or (b) contest a motion to compel arbitration.[19]

Arbitrators are generally selected by the parties to an agreement, which has the advantage of insuring that the arbitrators are familiar with the problems involved in and peculiar to the immediate controversy. To prevent the failure of an arbitration agreement for want of an arbitrator, the act provides that application may be made to the court therefor, whereupon the court may appoint arbitrators when for various reasons none have been appointed by the parties.

Arbitration of Controversy. When a controversy arises and is to be arbitrated, the act provides for service upon the other parties to the arbitration agreement by the party demanding arbitration of his intention to arbitrate. This notice shall state that unless within twenty days the party served shall serve a motion to stay arbitration, he shall thereafter be barred from putting in issue the existence or validity of the agreement or the failure to comply therewith.

The time and place for hearing are appointed by the arbitrators, a majority of whom may determine any question and render a final award, which normally must be made within thirty days from the closing of the proceeding. Arbitrators may require any person to attend as a witness, and to bring with him any book, record, document or other evidence. They may issue subpoenae. If these are not complied with, the arbitrators may petition the court, which may compel the attendance of persons so summoned or punish them for contempt in the same manner provided for the attendance of witnesses in the courts of the state. Should arbitrators fail to call a

[17] Rem. Rev. Stat. sec. 430-4. This is also a codification of the existing rule. See *State ex rel. Fancher* v. *Everett, supra* note 11, and cases cited therein.

[18] Rem. Rev. Stat. sec. 430-4 (3). The purpose of this section appears to be to satisfy the right to trial by jury provided by Art. 1, & 21, Wash. Const.

[19] Rem. Rev. Stat. sec. 430-4 (4). This section has no counterpart in the old act.

timely hearing, they may be directed by the court, upon application of a party, to proceed promptly with the hearing and the determination of the controversy. However, the new act contains no provisions for punishing arbitrators by contempt, as did the prior act. Neither does the new act specify compensation for arbitrators, or make compensation mandatory.[20] Upon application of a party to the agreement to arbitrate, the court may, prior to final determination of the arbitration, make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award.

The Award. The award shall be in writing and signed by at least a majority of the arbitrators—the number necessary to the rendition of an award. A true copy of the award shall promptly be delivered to each of the parties or their attorneys by the arbitrators.

An order confirming the award may be presented to the court by any party to the arbitration, and the court shall grant such an order unless the award is vacated, modified, or corrected. Upon the granting of an order, judgment or decree shall be entered in conformity therewith, and the judgment so entered has the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action, and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Upon application to the court of any party to the arbitration, and after notice and hearing, the court may vacate an award: (a) where it was procured by corruption, fraud or other undue means, (b) where the arbitrators were partial or corrupt, (c) where the arbitrators were guilty of misconduct which was prejudicial to the rights of any party, (d) where the arbitrators exceeded their powers or where the award was imperfect, or (e) where there were irregularities in the procedure. An award may not be vacated upon any of the grounds stated in (a) to (d) inclusive, however, unless the court is satisfied that substantial rights of the parties were prejudiced thereby.[21]

[20] Rem. Rev. Stat. sec. 423, the old act, provided for compensation of arbitrators.

[21] Rem. Rev. Stat. sec. 430-16. See, generally, *In re Arbitration etc.* v. *Lake Washington etc.*, 1 Wn. (2d) 401, 96 P. (2d) 257.

When an award is vacated, the court is required to direct a rehearing before the same or different arbitrators, according to its discretion. Under a similar section of the prior law, the courts consistently held that an arbitrator decides both the facts and the law.[22] that the error must appear upon the face of the award to be considered,[23] and that the court will not try a case *de novo,* but in the event of error will return it for another hearing by an arbitrator.[24]

An award may be modified or corrected, upon the application of any proper party, by the court where: (a) there was evident miscalculation of figures or an evident mistake, (b) the matter was not submitted to the arbitrators, or (c) where the award is imperfect in form or does not affect the merits of the controversy.[25] Although broader in its scope, this section is similar to Rem. Rev. Stat. sec. 464, providing for vacation and modification of judgments.

The new act provides that an appeal may be taken from any final order made in a proceeding under it, or from a judgment entered upon an award, as from an order or judgment in any civil action. This section has been interpreted by the court to mean that this appeal should be the same as provided for in Rem. Rev. Stat. sec. 1716, and that an appeal cannot be taken from an order to proceed with arbitration.[26]

Parties in the State of Washington are now provided with a modern, practical method of settling their present and future controversies by arbitration under their own written agreements. With thoughtful and clear drafting, and a sincere intention by all parties to avoid litigation and to solve their controversies amicably, arbitration under this act can be expected to greatly reduce litigation in civil controversies, to facilitate settlement of disputes, and to avoid much of the delay, expense, and unpleasantness which so often ac-

[22] *Hatch* v. *Cole,* 128 Wash. 107, 113, 222 Pac. 463, 464 (1924).

[23] *Puget Sound Bridge & Dredge Co.* v. *Frye,* 142 Wash. 166, 177, 252 Pac. 546, 550 (1927).

[24] *Hatch* v. *Cole, supra* note 22.

[25] Rem. Rev. Stat. sec. 430-17; *Carey* v. *Kerrick,* 146 Wash. 283, 263 Pac. 190 (1928).

[26] *All-Rite Contracting Co.* v. *Horace J. Omey,* 27 Wn. (2d) 898, 900, 181 P. (2d) 636.

company litigation.[27] To this end it can be expected that arbitration will be aided by the courts of this state, whose attitude toward arbitration was some time ago expressed in *Martin* v. *Vansant,* where the court stated: "The very decided tendency of modern times, however, is away from the artificial common law doctrine and in the direction of the more intelligent view that arbitration, as an inexpensive, speedy, and amicable method of settling disputes, should receive every encouragement from the courts, so long as it may be extended without contravening sound public policy or settled law."[28]

[27] J. Raymond Tiffany, Talk It Out, The Rotarian, Jan. 1944, reports: ". . . of some 14,000 cases the American Arbitration Association has decided . . . only six have been appealed to the courts, and in no case had any of these decisions been reversed." In Washington, the services of the American Arbitration Association are available to parties desiring to arbitrate. It is a non-partisan, non-political, non-profit-making organization, which will furnish upon request and for a nominal sum a panel of arbitrators composed of local professional and business men who volunteer their services. It has also established a set of rules governing the mechanics of arbitration which parties may include in their written contracts.

[28] *Martin* v. *Vansant,* 99 Wash. 106, 108, 168 Pac. 990, 991 (1917); See also *In re Arbitration etc.* v. *Lake Washington etc., supra* note 21.

REVIEW OF COURT DECISIONS

This review covers decisions in civil and commercial as well as labor-management cases. They are arranged under the main headings of: I. *The Arbitration Clause,* II. *Enforcement of Arbitration Agreements,* III. *The Arbitrator,* IV. *Arbitration Proceedings,* and V. *The Award.*

I. THE ARBITRATION CLAUSE

Contract of sale stated that price was to be O.P.A. "ceiling" at time of delivery, but prior to then, ceiling prices were discontinued. Determination that contract was valid by court's denial of stay of arbitration did not foreclose arbitrator from holding that, at time of delivery, price had become too uncertain for enforcement of the contract. *Knickerbocker Textile Corp.* v. *Elias Bros., Inc.,* 275 App. Div. 915, 90 N.Y.S. 2d 498.

Fraud in the inducement of contract containing arbitration clause will not constitute grounds for stay of arbitration when petitioner, after discovering the fraud, declared his willingness to perform the contract upon rectification of the fraudulent statement. "In the absence of prior rescission petitioner cannot avoid arbitration; to avoid arbitration he must have avoided and rescinded the contract containing the arbitration clause (*Matter of Kahn,* 284 N.Y. 515)." *Stupell* v. *Lauer,* 89 N.Y.S. 2d 192.

Carriage of Goods by Sea Act of the U. S. is not inconsistent with nor does it contravene provisions of U.S. Arbitration Act. Arbitration clause in bill of lading specified by parties as made subject to the Carriage of Goods by Sea Act is thus valid, although both parties are Portuguese corporations and the arbitration was to take place in Lisbon. Where a party seeks to repudiate an arbitration agreement contained in a bill of lading, such agreement may be pleaded as a defense to an action for damages and a stay of the trial was granted pending arbitration. *Uniao de Transportadores para Importacao e Comercio, Ltda.* v. *Companhia de Navegacao Carregadores Acoreanos,* 84 Fed. Supp. 582.

Oral modification of agreement is still a "controversy arising under and in relation to this contract, or any modification thereof," which should be settled by arbitration (*Lipman* v. *Haeuser Shellac Co., Inc.,* 289 N.Y. 76), although party contended that there was neither claim nor proof of an enforceable modification of purchase agreements which contained arbitration clause, and that oral modification was void. The motion to stay arbitration was therefore denied. *Talwil* v. *Geotrade, Inc.,* N.Y.L.J., June 24, 1949, p. 2255, Walsh, J.

Reference to invoice may be sufficient to make award definite since "the particular pieces respondent is obliged to accept are indicated in the invoice included by reference in the award." *Pacific Mills* v. *Ahrens-Everett-Melman, Inc.*, N.Y.L.J., August 24, 1949, p. 317, Justice Corcoran.

Right to cancel contract, by reason of events occurring subsequent to execution thereof, is for the arbitrators to determine (*Lipman* v. *Haeuser Shellac Co.*, 289 N.Y. 76). *Arthur J. Kane, Inc.* v. *Kluger, Inc.*, N.Y.L.J., July 1, 1949, McNally, J.

Obligation to arbitrate survives expiration of collective bargaining agreement where dispute was submitted while agreement was in effect. In affirming the Special Term order directing arbitration, the Appellate Division held: "The only issue in a proceeding of this character is whether a contract to arbitrate was in fact made and whether there is a refusal to proceed to arbitrate. The fact that the contract is no longer in existence is immaterial." (See *Arbitration Journal*, N.S., vol. 3, pp. 60 and 190 (1948)). The Court of Appeals upheld the lower courts' decisions. *Lane* v. *Endicott Johnson Corp.*, 299 N.Y. 725.

Abandonment of department by employer, resulting in discharges, was not an arbitral controversy. The court held that the clause dealing with discharges, wherein the employer agreed not to discharge a regular employee except for just cause and on notice to the union and wherein he was given the right of summary discharge in cases of drunkenness, gross negligence and similar types of misconduct, had no relevancy to issue of abandonment of a department. *B. F. Curry, Inc.* v. *Reddeck*, 86 N.Y.S. 2d 674.

Group insurance plan of collective bargaining agreement required employer to furnish union with information which the insurance company needed to keep records accurately and which employer did not fail to furnish. Where the employer offered to furnish affidavits as to correctness of payroll reports and where the union could check accuracy of information with the sixty employees involved, the court denied arbitration of dispute over union's request for right to examine employer's books and records. *In re Sohmer & Co., Inc.*, 89 N.Y.S. 2d 214.

II. ENFORCEMENT OF ARBITRATION AGREEMENTS

Merits of matters which parties agreed to arbitrate are not for determination by the Court, whose function, in cases wherein parties select arbitration as their tribunal of original jurisdiction, is "only to construe the contract to determine if the parties therein agreed to arbitrate" (*Tarello* v. *Johnson*, 294 N.Y. 646). *Alamo Manufacturing Co., Inc.* v. *Becker*, 275 App. Div. 835, 89 N.Y.S. 2d 809.

Failure to move for stay of arbitration within ten days under section 1458 Civil Practice Act did not preclude raising issue of whether a valid arbitration agreement had been entered into because notice of intention to arbitrate did not contain the required statement that unless a stay be applied for within ten days after service of notice, the person served "shall thereafter be barred from putting in issue the making of the contract." *Onondaga Silk Co., Inc.* v. *Roseville Frocks, Inc.,* 194 Misc. 326.

Common law arbitration agreement is revocable at any time before a final award is made. It was held by the Court of Appeals of Kentucky that the bringing of a suit by one of the parties is a revocation of the agreement. *Kramer* v. *Gough,* 220 S.W. 2d 577.

Architect's decisions were subject to arbitration under a contract which did not contemplate arbitration of all disputes arising out of the agreement but only limited arbitration of architect's decisions. Failure to submit claims to architect for decision bars arbitration thereon until such a condition precedent to arbitration has been satisfied. *Albert A. Lutz, Inc.* v. *Bond Stores, Inc.,* 275 App. Div. 925.

Agent for disclosed principal cannot be compelled to arbitrate either individually or as agent since valid service on the principal may not be made by serving the agent, in absence of parties' agreement to such service. *In re Mandel,* N.Y.L.J., June 14, 1949, p. 2113, Schreiber, J.

Piercing the corporate entities was allowed in an arbitration of an issue whether the party was a bona fide trucking operator or a "front" used by other truckers to avoid hiring union members. The court refused to vacate an award which found that the corporate entities should be pierced at least for the purpose of holding them to be one entity insofar as the labor dispute involved was concerned. *Cargo Distributors, Inc.* v. *Strong,* N.Y.L.J., June 24, 1949, p. 2251, Cohalan, J.

Judgment entered upon an award is a judgment upon the merits, and "res judicata of all matters reasonably comprehended in the dispute submitted to the arbitrators", notwithstanding that one of the parties refrained from participating in the arbitration. It was held that "the provisions of law actions do not apply to arbitration. If they did the salutory purpose of arbitration would be defeated." Said the court: "That the arbitrators are not hampered in the discharge of their duty by rules of evidence, or the body of case and statutory law governing the prosecution of actions is too well settled to require citation of authority". Therefore, a buyer of fabrics, against whom an award was made for the amount of the invoice, was barred from instituting a new arbitration to recover for losses allegedly incurred because of defects of the goods when the arbitrators had examined the garments made from the goods and found that the goods were not defective. *Springs Cotton Millls* v. *Buster Boy Suit Co., Inc.,* 275 App. Div. 196, 88 N.Y.S. 2d 295.

Counterclaim arising out of sales of yarn is an arbitrable issue when claim arising out of other sales is not disputed and all orders provide for arbitration. Said the court: "The course of dealing between the parties and the broad language of the arbitration clause establish that the parties contemplated submitting to arbitration all disputes arising out of these orders, whether considered separately or as a group". *Thomas Wolstenholme Co.* v. *Ria Herlinger Fabrics, Inc.*, N.Y.L.J., September 8, 1949, p. 410, Justice Corcoran.

"Evidence of custom is permitted for the purpose of qualifying the meaning of a contract where otherwise ambiguous . . . (but) is not permitted for the purpose of contradicting the agreements which the parties have made," said the court in *Gravenhorst* v. *Zimmerman*, 236 N.Y. 22. A contract prohibited work stoppages, but the arbitrator held that when read in light of a trade custom which he found existed, viz., the refusal of nonstriking employees to handle messages going to or coming from international companies whose employees were on strike, it did not prohibit the union from directing its members not to handle such messages. Holding that the terms of the contract were clear and unambiguous, the Appellate Division reversed and vacated the award and the Court of Appeals affirmed. (See *Arbitration Journal*, N.S., vol. 3, p. 190 (1948) for digest of lower courts' decisions.) *Western Union Telegraph Co.* v. *American Communications Association, CIO*, 299 N.Y. 177.

Landlord-tenant relationship, or binding contract to enter into such relationship, was held prerequisite to determination by arbitration or by court of rent in excess of emergency rent under Commercial Rent Law. Thus, court vacated arbitration award rendered before parties signed lease which provided that if the award were not confirmed within 20 days, the lease would be without effect. *Heidelberger* v. *Cooper*, 275 App. Div. 158, 88 N.Y.S. 2d 233.

In absence of binding lease, provisions of proposed lease could not be submitted to arbitration in compliance with statutory requirements. The award recited the absence of a written lease, and claim that an oral agreement existed was defeated by its contingency upon an award of a specified minimum rental. In granting a motion to vacate the award, the court referred to *Heidelberger* v. *Cooper*, 275 App. Div. 158, 88 N.Y.S. 2d 233, wherein the terms of the lease were held an important factor to be considered by an arbitrator in determining the proper amount of rent. *Maberg Optical Co.* v. *Master Matrix Service Co.*, N.Y.L.J., June 29, 1949, p. 2288, Schreiber, J.

"Questions arising out of the valuations, appraisals or other controversies which may be collateral, incidental, precedent or subsequent to any issue between the parties," which may be included in arbitration contracts under the 1941 amendment to the N.Y. Arbitration Statute, may be the sole issue covered by the arbitration clause. Said the Court: "If we take the view that, in permitting the submission or contract to 'include' the questions described, the amendment means that the matters referred to must be accompanied by such complete admeasurement of an arbitral controversy that the award would be conclusive upon the ultimate rights, then, in that view, the amendment in itself

would have no office because priorly only such an entirety of controversy was arbitral. *Matter of American Insurance Co.*, 208 App. Div. 168." Fire insurance policy provisions for appraisal of the amount of loss were therefore held applicable to supplemental agreement covering loss sustained by reason of suspension of business due to fire. *Fitzgerald* v. *Continental Ins. Co. et al.*, 275 App. Div. 453, 90 N.Y.S. 2d 430.

Waiver of right to arbitration by strike against dismissal of agent is not to be assumed. Said the court: "As long as the agreement has not been terminated arbitration thereunder may be ordered, even though it is claimed that the applicant for arbitration has committed a breach justifying rescission (*Lipman* v. *Haeuser Shellac Co.*, 289 N.Y. 76, 43 N.E. 2d 817, 142 A.L.R. 1088; *Kahn* v. *National City Bank*, 284 N.Y. 515, 32 N.E. 2d 534). . . . I do not think that the respondent's conduct was so destructive of the essence of the agreement as irretrievably to take away the right to seek its protection (*Lane* v. *Endicott Johnson Corporation*, 75 N.Y.S. 2d 171, 175, 176)". A motion to stay arbitration was therefore denied. *Metropolitan Life Ins. Co.* v. *United Office & Professional Workers of America, C.I.O.*, 86 N.Y.S. 2d 718.

Damages to which laid-off employees are entitled is for determination by the arbitrator if he should find the lay-off violated the collective bargaining agreement. *Fay* v. *Leon Machine Corporation*, N.Y.L.J., August 9, 1949, p. 227, Dickstein, J.

Although damages may be assessed by arbitrator for breach of collective bargaining agreement which provided for arbitration of "any and all matters in dispute between the parties hereto arising out of this agreement" and which gave arbitrator jurisdiction over "complaints" of breach of negative covenants contained in individual employment agreements with drivers limiting money damages for such breach to $200, arbitrator could not assess damages for breach of such negative covenant. To hold otherwise, said the court, would be to grant arbitrator power to assess damages not subject to the $200 limitation. *Utility Laundry Service, Inc.* v. *Sklar*, 275 App. Div. 838, 88 N.Y.S. 2d 305.

Provision for settling "all differences, disputes and grievances" by arbitration remains binding on employer who contracted with union and on employees who resigned and joined other union, both having accepted the benefits under the contract. Therefore, in an action by employees to recover union dues deducted from wages, on claim that they were no longer members of contracting union and automatic renewal clause in check-off rules was made invalid by Taft-Hartley Law, employer may not implead contracting union but must comply with union demand for arbitration as provided for in contract. *Barbein* v. *Superior Meter Co.*, N.Y.L.J., May 12, 1949, p. 1711, Nova, J.

Trial was directed of the issue as to whether the union with which employer contracted was the same union which demanded arbitration or whether, as was claimed, the union with which he contracted had not merely disaffiliated itself from the C.I.O. but was a wholly different union. *In re Lazarus & Co.*, N.Y.L.J., June 28, 1949, p. 2276, Schreiber, J

Taft-Hartley prohibition against contribution by employers to trust funds unless fund is administered by equal representation of employers and employees is made expressly applicable to contributions to funds established by agreement prior to January 1, 1946. Accordingly, the provision is inapplicable to a fund established in August 1945, although the agreement obligating a particular firm to make contributions was entered into on August 22, 1947. In denying the employer's motion to stay arbitration of dispute concerning latter's failure to make contributions, the court held that the Taft-Hartley Law "did not require that the trust fund, in order to be thus exempt (from restrictions) be established by collective agreement with each employer prior to January 1, 1946; only that the fund be one established prior to that date by any collective agreement. Such fund would remain exempt even as to new employees thereafter embraced within its operative provisions." *Matter of Baker*, 194 Misc. 51.

Responsibility of employer for failure to attempt renegotiation on anniversary date of agreement was for arbitrator to determine, under contract providing that "any dispute between the union and the employer which could not be adjusted was to be submitted to arbitration". *Dudic Holding* v. *Dumas*, N.Y.L.J., June 29, 1949, p. 2187, Schreiber, J.

III. THE ARBITRATOR

Any error of arbitrators in refusing to hear witness but conducting independent inquiry into market conditions was cured when, under an appeal permitted by rules of the American Spice Trade Association, the Arbitration Committee received such proof as offered. *Gosschalk* v. *Otto Gerdau Co.*, 275 App. Div. 754, 87 N.Y.S. 2d 541.

Arbitrators who failed to act as judges but acted as advocates for parties nominating them to an arbitration board, each presenting his nominator's cause by evidence and argument, were guilty of improper conduct. However, such conduct did not defeat the award because (1) the federal arbitration statute does not prescribe the composition of an arbitration board and (2) interest or bias permitting disqualification of arbitrators may be waived if a party with knowledge thereof proceeds with the arbitration without registering objection. The court found that the parties acquiesced in the procedure followed and confirmed the award. *Petrol Corp.* v. *Groupement D'Achat des Carburants*, 84 F. Supp. 446 (District Court S.D. New York).

Application of erroneous legal theory by arbitrator is no ground for setting aside the award (*Matter of Shirley Silk Co.* v. *American Silk Mills*,

257 App. Div. 375, 377 and cases there cited). *Fudickar* v. *Guardian Mutual Life Insurance Company,* 62 N.Y. 392, is distinguished since it does not appear expressedly on the face of the award nor can it be inferred that the arbitrators intended to decide the controversy in accordance with the law. *E. H. Beer & Co., Inc.* v. *Groupement National d'Achat des Tourteaux,* N.Y.L.J., July 8, 1949, Cohalan, J., p. 45.

Hearsay investigation of fair rental value by arbitrator on his own initiative, though doubtless done with the best intention, without giving party opportunity of controverting such proof, is misbehavior which is grounds for vacating the award (*Berizzi Co.* v. *Krausz,* 239 N.Y. 315). *290 Park Avenue, Inc.* v. *Fergus Motors, Inc.,* 275 App. Div. 565, 90 N.Y.S. 2d 613.

IV. ARBITRATION PROCEEDINGS

Award rendered by three arbitrators present at hearings under a submission callling for six-man arbitration board was held not binding, although the presence of all would not be required in deliberations following the hearings. Consent to and participation in proceedings at which said three arbitrators were present did not constitute waiver of rights under submission to six-man board. *Buitoni Products, Inc.* v. *Nappi,* 275 App. Div. 215, 88 N.Y.S. 2d 570.

Exclusion of counsel from an arbitration hearing conducted under the Rules of the General Arbitration Council of the Textile Industry, which expressly accord to parties the right to representation by counsel, was grounds for vacating the award and for directing a rehearing before new arbitrators. Although the other party did not appear by counsel, the court did not consider failure to protest the exclusion a waiver since a layman could not be expected to indicate that he was proceeding under protest. *Raycrest Mills, Inc.* v. *A. M. Pearlman, Inc.,* N.Y.L.J., June 30, 1949, p. 2299, Schreiber, J.

Failure to accept registered mail notices which, the court held, contained proper notice of every step in the arbitration proceeding as conducted under the rules of the General Arbitration Council of the Textile Industry; and, after a "mere lip-service request for delay," failure to participate while the arbitration was pursued to completion constituted a "mere attempt to protract the proceeding" and would not defeat confirmation of the award. *Stafford International Corp.* v. *Hartman Hosiery Co., Inc.,* 89 N.Y.S. 2d 172.

Single board of arbitrators may decide several grievances under collective bargaining agreement providing for AAA arbitration "for any grievance, dispute or controversy between the company and the union". Said the court: "The collective bargaining contract between the parties in the light of the present day tendency to streamline all judicial and semi-judicial proceedings must be interpreted to provide that all grievances, disputes and controversies existing between the parties at the time that arbitration is sought under the

said contract are subject to arbitration before a single Board of Arbitrators even though more than one such grievance, dispute or controversy is pending at a given time and the contract does not require the submission of each individual grievance, dispute or controversy to a separate Board of Arbitration, and the objection that a single Board of Arbitration considering more than one such grievance, dispute or controversy would be inclined to compromise claims between the parties is without validity." *United Electrical Radio and Machine Workers of America, Local 437, C.I.O.* v. *Kidde Manufacturing Co., Inc.,* Superior Court of New Jersey, Essex County, L-4442-48, April 27, 1949, Smith, J.

Reconvened arbitration board for purpose of clarifying award may not make new award, so that in interpreting whether its award of a 17¢ hourly increase applied to stores personnel as well as others, it could not make a new award to such personnel of 10¢ an hour. *Mid-Continent Airlines, Inc.* v. *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees,* 83 F. Supp. 976 (District Court W.D. Missouri).

V. THE AWARD

A submission of partnership controversies to one arbitrator provided that "all rulings and decisions and findings by the arbitrator, either based upon fact, law or mixed questions, shall be final and binding upon all of the parties hereto, without recourse, objections, appeals or any other form that might be used to modify or reverse any of the findings and decisions of the arbitrator". The Supreme Court of Pennsylvania held that a party could not complain of the action of a receiver in executing an award before it was approved by the court. *Scheckter* v. *Rubin,* 66 Atlantic 2d 777.

In absence of request for modification of arbitration award, the award must be either confirmed or vacated. *Petrol Corp.* v. *Groupement D'Achat des Carburants,* 84 F. Supp. 446 (District Court S.D. New York).

Assignee is not considered authorized to ask for confirmation of an award, as a party to the controversy, pursuant to Sec. 1461 C.P.A. Said the court: "This conclusion is reached reluctantly because it does not seem to be in accord with the modern approach to procedure, which tends to cut through form in order to achieve a just result expeditiously. In this instance, however, the streamlined remedy is statutory and extension of it is a matter for legislative action." *Cadbury-Fry (America), Inc.* v. *Opler,* N.Y.L.J., August 17, 1949, p. 275, Nathan, J.

Requirement of releases from subcontractors as directed by award, was an issue in the action for its confirmation in an arbitration the sole purpose of which was to fix the amount due for labor and materials furnished. The award which required a party to submit releases and to file an affidavit that

all bills have been paid exceeded the arbitrators' authority. Though the court may make a correction under Sec. 1462-a(2) C.P.A. (*In re Amalgamated Watch, Clock and Time Instrument Workers,* 270 App. Div. 802), such motion has, however, to be filed within three months (Sec. 1463 C.P.A.). Since this time limit for modification had expired, the court had to confirm the award. *Preferred Contractors, Inc.* v. *Messinger,* N.Y.L.J., June 23, 1949, p. 2241, Walsh, J.

Court may not direct confirmation of award where appellant appealed from order vacating award but failed to appeal from that portion of the order which denied confirmation, despite reversal of order vacating award. Appeal will not be dismissed, however, since the effect of such reversal is to reinstate the award, which stands although not confirmed. *Gosschalk* v. *Gerdau Co.,* 275 App. Div. 754, 87 N.Y.S. 2d 541.

Award itself, although unconfirmed, has the effect of a binding judgment (*N.Y. Lumber & Wood-Working Co.* v. *Schneider,* 119 N.Y. 475). Filing a properly executed award in the office of the Clerk of the Supreme Court is a sufficient compliance with Article 84 Civil Practice Act to enforce it. *Rubman* v. *Lewin,* 89 N.Y.S. 2d 203.

Illegal trade restrictions will not be enforced by confirmation of an award when they are violative of Sec. 340 General Business Law (voiding contracts or agreements for monopoly or in restraint of trade). *Randall* v. *Sinreich,* N.Y.L.J., June 28, 1949, p. 2275, Cohalan, J.

Remedy in case of imperfect or incomplete award is not to bring an action at law involving the dispute which had been submitted to arbitrators and which their award embraced by its specific provisions of a "full settlement of all disputes arising out of or relating" to the numbered and dated contract. *Linker & Herbert* v. *Knickerbocker Textile Corporation,* N.Y.L.J., June 7, 1949, p. 2022, Kahn, J.

Distinction between summary and plenary actions was drawn with respect to vacating fair rental arbitration awards. A motion to vacate made in the arbitration proceeding was denied as not timely under 1463 C.P.A. which specifies a three-month limit, "without prejudice to the institution of a plenary suit." *In re Nelson,* N.Y.L.J., June 29, 1949, p. 2288, Null, J. See also *Royal Automotive Service, Inc.* v. *Gunlen Realty Corp., Inc.,* June 16, 1949, p. 2154, wherein Justice Walsh held that the three-month statute of limitations does not apply to a proceeding to vacate fair rental arbitration awards for fraudulent circumvention of the Commercial Rent Law, and *Charles-Meher, Inc.* v. *Kaufman,* 275 App. Div. 963, 90 N.Y.S. 2d 87, wherein the Court held that invoking the statutory remedy to vacate an award rendered under Commercial Rent Law binds the movant to the three-month time limit.

PUBLICATIONS

Historical development of arbitration and its increasingly more important role in settling international disputes has been evidenced in publications of international character which contribute significantly to greater knowledge and understanding of this means of amicably adjusting controversies. In the past, there was a paucity of material in this area, but more recently, attention has been devoted to the arbitral process in relation to the work of the International Law Commission established by the United Nations General Assembly. (See "The Law of Arbitral Procedure," *Arbitration Journal*, N.S., vol. 4, p. 5 (1949).)

Systematic Survey of Treaties for the Pacific Settlement of Disputes, 1928-1948, offers an analysis of settlement agreements in treaties, explaining the basic types, general jurisdictional clauses and reservations. A special Chapter II on the adjudication of arbitration of disputes (pp. 50-129) deals with the following topics: acceptance of the jurisdiction of the court or of an arbitral tribunal, definition of legal disputes, special agreements, procedure in cases where the parties fail to agree upon the terms of the special agreement, appointment of arbitrators, arbitral and judicial procedure, law to be applied by the court or by an arbitral tribunal, and the judgment of the court or the award of the arbitral tribunal. Part II of the book contains the text of the treaties and chronological and alphabetical tables. The Survey, with its wealth of comparative background material, is indispensable to anyone who is concerned with the development of arbitration in the settlement of international disputes. (United Nations Publications, Sales No. 1949.V.3 (March 1949), 1202 pages, $10.00.)

Report of International Arbitration Awards is of importance since awards are a "subsidiary means for the determination of the rules of law" as provided in article 38 of the Statute of the International Court of Justice. The collection, of interest also to the various national and international bodies concerned with the progressive development of international law, is confined to arbitral decisions rendered in disputes between states, with the exclusion of the decisions of the Mixed Arbitral Tribunals set up under the peace treaties after the first World War. The decisions, which are preceded by summaries, cover the period from the first World War in 1914, the first award in the matter of expropriated religious properties in Portugal, to the last award reported in the second volume—that of January 23, 1933 on the Honduras Borders Dispute. (United Nations Publications, Sales No. 1948.V.2 and 1949.V.1, 2 vols. 1369 pages.)

Survey of International Arbitrations 1794-1938 is an important publication by the Dutch scholar, A. M. Stuyt. In it, 400 arbitrations are analyzed in chronological order by naming the parties, the nature of the dispute, the character of the arbitral tribunal, the arbitration treaty or special agreement under which the arbitration was held, and the award or other disposition of the case, with further bibliographical data. The numerous references in this Survey make it an indispensable tool. (The Hague: Martinus Nijhoff, 1939, 479 pages, gld. 21.)

The Judicial Function and Industrial and International Disputes by Judge Robert N. Wilkin. This contains an interesting historical analysis of the function of the judiciary from ancient times through early English history and the middle ages. Linking it with the present, the author favors the use of judicial procedures for the settlement of industrial and international disputes. (Charlottesville, Va.: The Michie Company, 1948, 91 pages.)

American Journal of International Law, vol. 43, 1949. Arbitration clauses in commercial treaties of the United States, such as those embodied in the recent Treaty of Friendship, Commerce and Navigation with China, are considered in an interesting article by Robert R. Wilson at page 262. The same publication also contains, on page 329, a note on the application of the Treaty of Rio de Janeiro to the controversy between Costa Rica and Nicaragua.

"The Role of Controversy in the Public Opinion Process" by Harry Estill Moore, *International Journal of Opinion and Attitude Research,* Summer 1948, p. 207. Seeking to define "public opinion," the author quoted sociologists who attribute major importance to the role of controversy in the formation of public opinion, e.g., Park and Burguess, *Introduction to the Science of Sociology* (p. 794): ". . . public opinion is determined by conflict and discussion, and made up of the opinions of individuals not wholly at one. In any conflict situation, where party spirit is aroused, the spectators, who constitute the public, are bound to take sides . . . . It is this fact of conflict, in the form of discussion, that introduces into the control exercised by public opinion the elements of rationality and of fact." The author expressed his disagreement by pointing out that conflict and rational procedure are more or less antithetical because as conflict increases, rationality decreases and gives way to emotion. Public discussion, he stated, is "the process through which public opinion is born . . . . Where there is discussion, there is often divergence . . . . Where there is divergence (however), there is not always the necessity for conflict."

The article is a further indication that the problem of controversy, with its resulting discussion and decision, is becoming more and more a topic for consideration by social scientists. The article presents two views, and although occasionally it seems that fine distinctions are made on the basis of semantics, it is an interesting sociological presentation of a question which affects all areas of public thought today.

Commercial Arbitration and the Law Throughout the World by International Headquarters of the International Chamber of Commerce in Paris. This is a summary of rules concerning arbitration agreements, procedure, arbitral awards, enforcement of awards, and the means of recourse. It offers a facile and at the same time reliable source of information on the legal provisions governing arbitration in 43 countries. Foreign trade circles will find this manual extremely helpful and of great practical value. The loose-leaf system will facilitate the use by later inclusion of more detailed references to statutory law and to the principal court decisions of the various countries in matters of arbitration. (Basle, Switzerland; delivery by Albert J. Phiebig, 545 Fifth Avenue, New York, $16.50.)

Labor in America by Foster Rhea Dulles. A history of the growth and development of the organized labor movement in the United States from colonial times through the passage of the Taft-Hartley Law, this is an interesting although elementary study which would seem best suited to the lay reader who opens the book with little—if any—knowledge of the organizational background of American labor unions.

Limited in scope, the emphasis is upon national labor groups. Yet it would seem difficult to achieve a true historical perspective without considering the history of strong individual unions, the role of women workers, union social welfare activities, the relationship between American labor and labor abroad, etc. The failure to deal with these factors might leave a mistaken impression with the reader who is unacquainted with them.

As the author approaches the present in his chronological study, his analysis and presentation occasionally lose some of their objectivity. Yet, there is a real need for a simple history of the American labor movement, and the early chapters here offer the uninitiated an easy and informative sketch of its development. (New York: The Crowell Company, 1949, 402 pages, $4.50.)

Insights into Labor Issues by Richard A. Lester and Joseph Shister. As labor issues assume an increasingly important role in the national economy, the need for a well-informed public has become essential. This symposium on contemporary labor problems by 17 labor economists is a step in that direction. It is divided into three sections: Labor Relations, Wages and the Labor Market, and Labor and Full Employment; arbitration is dealt with in three of the thirteen essays.

In "Grievance Proceedings and Collective Bargaining," Neil W. Chamberlain dealt with the confusion between collective bargaining and grievance proceedings and called for a clear distinction between the "legislative or policy-making function" and the "judicial or compliance function" as the difference between making the laws and interpreting and applying them.

"The Role of the Specialist" is discussed by Everett M. Kassalow: "Professionalization or, more aptly, bureaucratization . . . of collective bargaining has . . . been accelerated by the widespread adoption of arbitration clauses in union agreements," and the effect of settling controversies on specialized levels may well result in codifying arbitration. Although the author felt that this is disadvantageous because a collective bargaining agreement is a unique instrument, to be interpreted within the limits of the particular relationship between the parties, he regarded the trend as a penalty for "bigness" of American industry. However, the author here fails to recognize the possibility for specialization to result in the development of experts who would be better equipped to deal with the individual case at hand.

Eugene Forsey, in "Trade Union Policy Under Full Employment," discussed a possible inflationary trend caused by sectional wage bargaining (union-by-union, plant-by-plant, industry-by-industry) and suggested that coordination of union wage policies by central labor organizations was preferable to arbitration. Clearly, peaceful methods of wage bargaining are preferable to conditions which might lead to disputes. However, it would appear unlikely that collective bargaining could operate without some disputes arising. Also,

arbitration-users have found that making provision for arbitration seems to reduce the necessity for making use of it.

It is regrettable that in an analysis of problems in labor economics by people prominent in the field, not even one section was devoted exclusively to arbitration. However, although the essays are short and necessarily of limited scope and depth, this is an interesting and informative contribution to the literature of labor economics, and, as the editors point out, ". . . in the human aspects of American industry, the nation badly needs more light and less heat." (New York: The Macmillan Company, 1948, 368 pages, $4.00.)

Cases on Labor Relations by Harry Shulman and Neil Chamberlain. Since most collective bargaining agreements contain provisions for the adjustment of grievances with arbitration as the final step in the grievance procedure, lawyers, representatives of management and labor, personnel directors and laymen interested in labor relations will appreciate the contribution this volume will make to a fuller understanding of the problems confronting both management and labor, in terms of those which have been submitted to arbitration.

This collection of arbitration awards covers disputes which commonly arise during the life of a collective bargaining agreement, supplemented by extensive bibliographies. Although such awards may not be cited as precedents, this information will help labor and management to avoid pitfalls—e.g., by the use of more specific clauses, by the avoidance of conditions which most often give rise to particular types of dispute, etc. By describing actual experiences, the volume offers a more personal and alive approach than that of a text and thus will be helpful to all who are interested in labor problems, in the process of arbitration, and in the economic and human factors in industrial group action. (New York: The Foundation Press, 1949, 1266 pages, $8.00.)

Collective Bargaining Contract Clauses by the Labor Information Service of the Southern Pine Association, New Orleans, La. A loose-leaf manual prepared for the special use of employers in the southern lumber industry, it is geared to serve management in its negotiations with labor, and offers a record of the experience of such employers as reflected in clauses embodied in their 117 collective bargaining agreements in effect as of April 1, 1949. The section on Grievances and Arbitration includes clauses on the following subjects (the numbers in parentheses denote the number of contracts of the 117 analyzed which contained such clause): matters constituting grievances (72), complaint must be made in writing (59), work stoppages barred during grievance proceedings (23), time for filing grievances limited (50), steps in settling grievances (113), contractual agreement to arbitrate and finality of decision (65). The last section is subdivided into selection of arbitrators (75), arbitration authority limited (22) and cost of proceedings (54).

Partners in Production by the Labor Committee of the Twentieth Century Fund assisted by Osgood Nichols. Emphasizing a new approach to fundamental problems of labor-management relations, this study is positive in concept, maintaining that labor and management can, by mutual under-

standing, overcome the major conflicts which arise. These problems are analyzed and discussed in three areas according to relative degrees of conflict. The first two categories in which the goals of labor and management are described as mutual or apparently conflicting need only little effort on the part of both sides to bring both parties into agreement. Solution of problems in these areas would result in untold benefits to worker, management, production generally and the national welfare.

The Authors admit that in the third category there is "A real conflict between the workers' desire for economical and social security and management's primary goal—the economic welfare of the enterprise." The Committee suggests that all energy be diverted to setting up an "agreed statement of economic principles" which will form the basis for understanding "the wage-profit relationship in a democratic system of competitive private enterprise."

The Book concludes, as have other volumes of the Twentieth Century Fund, with the Labor Committee's Summary Analysis and Recommendations. It is a book which thinkers in the labor-management field should not miss.

The Committee, assisted by Osgood Nichols, should be congratulated on an excellent contribution to American democratic thinking. (New York: American Book—Stratford Press, 1949.)

Can Labor and Management Work Together? by Osgood Nichols and T. R. Carskadon. This is an incisively written and well illustrated pamphlet which answers that question with an emphatic *yes*. Taking the "human approach," the authors dealt with the separate and mutual goals of management and labor, and with the ways in which goals of seeming or real conflict can be made the basis for cooperation and compromise. In showing that both groups are responsible for maintaining high productivity, which is the key to plenty, cooperation between management and labor is called essential to our future welfare. The pamphlet is based on *Partners in Production* by the Twentieth Century Fund Labor Committee, dealt with above. (New York: Public Affairs Committee, 1949, 32 pages, $.20.)

"Arbitrating a Wildcat Strike" by Willard A. Lewis, *Harvard Business Review*, July 1949, p. 498. This is a case study wherein 300 workers walked off the job in a one-day strike disavowed by the union, returning the next day under its direction. Under National Labor Relations Board decisions, management had the right to discharge participants in a wildcat strike or merely its ringleaders, and relying upon this, management announced to the 300 returning workers that they were all fired as of the morning of the strike, but that all whose time cards were on the racks had been rehired. Ten time cards were missing.

The collective bargaining agreement provided for arbitration, thereby making it possible for the union to challenge the justifiability of the discharges. The union claimed that the choice was made at random, to set an example to the other workers, and that management was using the strike to rid itself of workers against whom they had old scores to settle. Management claimed that rehiring the 290 workers as new employees fell under its absolute right

to hire, and that since this was a management prerogative, there existed no arbitrable issue. It resisted grievance proceedings up to arbitration, but the following submission agreement was finally drawn: "Did the employer have the right to refuse to rehire the ten named persons, or any one of them, following the work stoppage or strike which the union had disavowed?" The arbitrator found that the *en masse* discharge was a legal fiction—that no substantial rights had been lost by the 290 rehired, that no appropriate records had been made of the discharges and that neither union nor workers acknowledged the discharges. If the ten who were refused rehiring had been ringleaders, management would have been justified under NLRB decisions. The arbitrator denied relief to those who he found had been responsible for leading the strike, and ordered reinstatement for the others.

Since the analysis was geared for management, several of the author's conclusions were in its favor. However, he made these recommendations in the interest of increased labor-management cooperation: joint consultation and action to prevent unilateral action in the absence of strong leadership of wildcat strikes, a predischarge investigation by company and union to dissolve errors in fixing responsibility and to permit consideration of measures short of discharge, and disciplining members in wildcat strikes by unions to remove unnecessary friction.

Health Plans under Collective Agreements (Analysis and Evaluation) by Richard Eilbott, Professor of Economics, Pacific University, Forest Groves, Oregon. This doctorate thesis is a comprehensive study of health plans—their structure, development, coverage, financing, control, and relationship to collective agreements. Various collective agreements provide for arbitration in the event of a deadlocked controversy, but to be successfully administered, said the author, it is essential that both parties to the plan approach it with good faith. Otherwise, when administering trustees are interrupted by a dispute resulting in the resignation or dismissal of a trustee, even arbitration may not prevent a party from refusing to appoint a successor trustee on the grounds of "improper" operation of the plan. Also, a cooperative attitude could help trustees assume responsibility or at least a concern for maintaining amicable relations not only with respect to the health plan, but also in the broader areas of labor-management relations.

An element of special importance in the legal relationship between collective agreements and health plans is the jurisdiction of arbitrators, because employers, when joining an industry-wide agreement (after January 1, 1946), have been required to participate in the benefit program in existence by contributing to the fund established for its administration.

Labour Relations and Precedents in Canada by Alfred Cosby Crysler. An analysis of dominion and provincial labor laws, although somewhat slanted for lawyers because of its extensive annotations and texts of statutes, this volume can be read with interest and understanding by laymen merely interested in labor relations as well as those working in the field.

The historical development of Canadian labor laws and related legislation is dealt with extensively. Included is a detailed analysis of the changes in the

Wartime Labour Relations Regulations made by the Industrial Relations and Disputes Investigation Act, which became law on June 30, 1948. Other major sections deal with the decisions of the National War Labour Board and the National Wartime Labour Relations Board, and with recommendations of Boards of Conciliation. A "Chart of Prevailing Clauses in Collective Agreements," covering those in standard use by 31 major trades and industries, gives a picture of the use to which arbitration is put. For example, the Chart indicates that collective agreements in standard use by 25 of the 31 industries surveyed contain clauses providing for the submission to arbitration of matters unsettled under grievance proceedings, that 15 provide for arbitration of matters unsettled under grievance proceedings which deal with interpretation or violation of the agreement, and that 30 of the 31 surveyed provide that the award shall be final and binding. (Toronto: The Carswell Company, 1949, 504 pages, $9.50.)

Labour Courts in Latin America. This study deals with the settlement of legal labor disputes, defined as those "regarding the interpretation or application of regulations already laid down or of rights already acquired, whatever their basis may be—individual contract of employment, collective agreement, legislation or custom." Following a brief description of the methods of settlement in the United Kingdom, France, Sweden and Germany, and of grievance procedure in the United States and Canada, the settlement of legal labor disputes in Latin America is described with clarity and brevity, including a survey of existing systems of Labour Courts and their organization, competence and operation. Thus, there are two major approaches to dealing with legal labor disputes: 1) contractual procedure, rules for which are established by the parties in their collective bargaining agreements, and 2) special agencies established by law—either "Labour Courts" or "conciliation and arbitration boards."

The report points out several "weaknesses" in contractual procedure and declares that the objective of Labour Courts is to overcome those weaknesses. Labour Courts afford both employers and employees adequate protection of their rights; they perform needed functions in countries where collective agreements themselves are governed by legal restrictions; and only a legal judiciary can interpret the legal provisions in countries where legislation plays a role in the regulation of labor relations greater than that played by collective bargaining agreements. However, the report concludes, the two approaches can co-exist, and may well supplement each other. (ILO Studies and Reports, New Series, No. 13, 1949, 110 pages, $.75.)